

How



REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

EDITED BY

CHRISTOPHER ROBINSON, Q.C.

VOL. XXXIV.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 37 VICTORIA, TO EASTER TERM, 37 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S
OF THE
COURT OF QUEEN'S BENCH.

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

Attorney-General :
THE HONORABLE OLIVER MOWAT.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 37 VICTORIA, 1873.

(November 17th, to December 6th.)

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

IN RE THE SHERIFF OF THE COUNTY OF LINCOLN AND THE
TREASURER AND THE CORPORATION OF THE COUNTY OF
LINCOLN.

Sheriff's account—County audit—Allowance by Government.

A sheriff's account against a county is payable as soon as audited by the county board of audit, and the county treasurer is not justified in withholding payment until the account has been allowed and paid by the Government to the county.

DURING this Term *James A. Miller* obtained a rule calling on the Treasurer of the County of Lincoln, and also the Corporation of the County, to shew cause why a mandamus should not issue, commanding them to pay the sum of \$176.02, the amount of the Sheriff's account as rendered and audited.

The papers filed on moving the rule were, a detailed account of the Sheriff made out against the County for the quarter account to the June Sessions, 1873, amounting to

\$176.10, and a memorandum of the allowance of that sum by the Chairman of the Sessions of the Peace and the two duly appointed auditors, Robert Lawrie and Calvin Brown, dated the 7th July, 1873; an affidavit of the correctness of the account, made by the Sheriff before the audit; an affidavit made by the Sheriff, that his account, with the memorandum of audit upon it, was presented to and left with the Treasurer, and payment of the same was demanded of him, who admitted he had funds of the County sufficient for such purpose; but he refused and still refuses to pay the same.

The Treasurer made affidavit, that he declined to pay the Sheriff's account when it was presented until it was audited at the office of the Provincial Treasurer, and until he had received funds from the Provincial Treasurer to pay the same: that the account was afterwards audited in the office of the Treasurer of the Province, and \$27 was deducted from it; and on the 1st of August last, and as soon as he received the funds from the Provincial Government to pay the account, he offered to pay the amount of it, less the sum deducted from it by the Provincial auditor, to the Sheriff, who refused to accept it; and that he had always been ready to pay the sum he offered to pay.

The Sheriff, in a later affidavit, denied the offer stated by the Treasurer to have been made to pay the account, less the \$27 deduction, to him.

There were other papers filed, not material to be set out, among them a memorandum of the items which had been disallowed by the Provincial auditor.

Bethune shewed cause. The Sheriff can claim payment only in respect of items which form part of the expenses of the administration of criminal justice in Ontario, under the Consol. Stat. U. C. ch. 120. And by sec. 2 these accounts are to be "examined, audited, vouched, and approved of, under such regulations as the Governor in Council from time to time directs and appoints." The Sheriff cannot claim payment until his account has been so audited and approved

And here he has been offered by the Treasurer the sum which was allowed. He has refused to accept that sum, and he insists he must be paid by the Treasurer of the County whatever sum his account may be allowed at by the County Board of Audit, whether the amount so allowed is afterwards audited and allowed by the Provincial auditor or not. *The Corporation of the County of Lambton v. Poussett*, 21 U. C. R. 472, shews that the Sheriff is not entitled to be paid until his claim has been finally audited by the Government, and it follows that he should only be paid the amount which has been finally allowed and paid over for him. See also *Re Poussett and The Corporation of the County of Lambton*, 22 U. C. R. 80. It is true the Consol. Stat. U. C. ch. 119, sec. 7, provides "that the Treasurer of every County shall, without further authority, pay the amount of fees which may be payable out of the county funds when duly allowed," as the method then was, "by the magistrates in Quarter Sessions assembled," but that applies only to such demands as are payable out of county funds, and not to the items of the account now in question, which are payable from the administration of criminal justice fund; and *Daniels v. The Municipal Council of the Township of Burford*, 10 U. C. R. 478, 481, and *The Municipality of the Township of East Nissouri v. Horseman*, 16 U. C. R. 576, shew that if the Treasurer pay without authority moneys in his hands of the County, he will be personally responsible for the payment.

The order of the Governor in Council, dated the 10th of August, 1846, requires all demands of the party rendering the same to refer 'to the authority for the charge.' The Sheriff has not done this in his account, and so he cannot claim the items in question, though they may be rightly allowable, from the Treasurer, when the Treasurer has not been paid by the Government for such items.

Miller supported the rule. It is of no consequence to the Sheriff whether the Treasurer of the County has received the money from the Government or not. He is bound to pay the Sheriff at all events when his account

has been audited by the County Board. The Statutes referred to were passed to regulate the course of proceeding between the different Counties and the Government, and they have no reference to the claims of the different County officers, as between them and the County.

WILSON, J., delivered the judgment of the Court.

In the case of *The County of Lambton v. Poussett*, 21 U. C. R. 472, 485, Sir John Robinson was of opinion the accounts of the County officers should be made out against the County, and he thought, p. 484 "it would be very inconvenient if the council were to pay such accounts to the several officers before audit by the Government auditors and final allowance by the Government, for then occasions might be constantly arising for reclaiming from the officers any sums that the Government county auditors or the Inspector General may have rejected." And he also said at p. 485 "I do not think that the schedule appended to ch. 120 was intended by the Legislature to embrace all the expenses of criminal justice that were to be charged against the Government, but only to point out that all the charges specified in it were to be deemed within the Act, and thus to remove all doubt as to such charges. The last sentence of that Statute (p. 980,) makes that plain, for this is added to the schedule, 'together with all other charges relating to criminal justice, payable to the foregoing officers, specially authorized by any Act of the Legislature.'"

The case throughout supports the contention, that the County officers may have charges against the County which the County is obliged to pay after an audit by the County officials, whether the County is re-imbursed or is entitled to be re-imbursed by the Government or not. And that the County officers may also have claims against the County which the County is strictly entitled to have paid to it by the Government.

In the later application between the same parties, 22 U. C. R. 80, the Court was of opinion that the accounts of the Clerks of Peace, when audited by the County authorities,

were payable by the Treasurer when their order for payment of the same was passed under Consol. Stat. U. C. ch. 121, sec. 4, and that any charges subsequently found to have been wrongly allowed and paid could be recovered from the party who received the payment.

By the Consol. Stat. U. C. ch. 121, sec. 1, as re-enacted by the 32 Vic. ch. 16 sec. 9, subsec. 2, O., and as amended by the 33 Vic. ch. 8. sec. 1, O., all accounts and demands preferred against the County are to be audited and approved by the Board of Audit.

Then by sec. 3 of ch. 121, Consol. Stat. U. C., as amended by 34 Vic. ch. 29, sec. 1, O., these accounts and demands are to be delivered to the Clerks of the Peace on or before the first days of January April, July and October, in every year, and as further amended by the 33 Vic. ch. 8, sec. 2, O., such of the accounts and demands as shall be delivered on the first day of the sittings of the Courts, &c., shall be audited by the Board of Audit, which shall take the same into consideration between the first and fifteenth of the months of January, April, July, and October, in each year, and dispose of the same as soon as practicable. And all orders or checks signed by the Chairman of the Sessions, (except for the payment of constables or for services rendered during the sitting of the Court,) shall express the Act of Parliament, if any, under which the expenditure is authorized.

And by sec. 4 of ch. 121, Consol. Stat. U. C., the Clerk of the Peace is to furnish the Treasurer with a list of the orders passed, according to their priority, and the Treasurer shall pay the same according to the respective dates and numbers in which they were passed; but all sums to defray the expense of the custody and maintenance of prisoners, and the accounts of public officers, and officers of the Court, shall be first paid.

By Consol. Stat. U C., ch. 119, sec. 7, the Treasurer of the County is directed, without further authority, to pay the amount of the fees which are payable out of the County funds, when duly allowed, as in the order prescribed by law for the payment of the expenses of the administration of justice:

1. The expenses of levying, &c., the rates and taxes.

2. All sums payable out of the funds of the County to the Sheriff, &c., for the support, &c., of the prisoners in gaol, or for repairing, &c., the Court House, &c., or for any other purpose whatever connected with the administration of justice within the County, shall be paid out of the County funds by the Treasurer before and when not otherwise provided by law, in preference to all other charges.

It appears to me, that the following inferences may be made and the following course of proceeding may be collected from the Statutes, in questions relating to the presentation, auditing, and payment of the accounts of County officers.

The accounts are to be delivered to the Clerk of the Peace on or before the 1st days of January, April, July and October of each year. They are to be audited by the Board of Audit between the 1st and 15th of these respective months.

How the accounts are to find their way before the board does not appear. Nor is it said what the auditors are to do with the accounts which they have audited.

But the Chairman of the Sessions, who is now one of the board, is to sign some orders or checks for the payment of the sums allowed, and they are to express in them, (excepting as to certain items), the Act of Parliament, if any, under which the expenditure is authorized.

The chairman is not now, whatever he may have done before, to give a check on the bank for payment of the account; because the next proceeding is, that the Clerk of the Peace is to furnish the Treasurer with a list of the orders passed according to their priority. Though it is not said how the Clerk of the Peace is to get the list or the means of making it up from the auditors.

And when the Treasurer gets such list he is to pay the accounts according to their priority, but he must pay:—

- 1st. The charges connected with levying the rates and taxes.

- 2nd. The charge for maintenance, &c., of prisoners.

3rd. The charge for repairing the Court House.

4th. The other charges connected with the administration of Justice, and

5th. The other demands on the County, in the order in which they have been directed to be paid and were allowed.

Whether that course was strictly pursued here or not is of no consequence, for that was not the point on which the parties desired the judgment of the Court.

It was, whether the Treasurer was right in refusing to pay the Sheriff's account, audited and allowed by the County Board of Audit, until it had also been allowed and audited and the amount of it paid over by the Provincial Government to the Treasurer. And we are of opinion he was not.

The Treasurer after the County audit is, without further authority, to pay such an account as the one in question, unless he can shew that the items in question were so inadmissible and illegal that if they were paid the money could be recovered again from the person receiving it.

The auditing and accounting with the Government is a matter alone between the Government and the County.

The auditing of the County Board is the matter between the claimant and the County Treasurer.

We are of opinion also, that as the County Treasurer is to pay such accounts as are in question without further than the County officials' authority, he was not justified in postponing payment of the Sheriff's account until it was allowed and paid by the Government.

This is not quite in accordance with the opinion entertained by Sir John Robinson in *The Corporation of the County of Lambton v. Poussett*, 21 U. C. R. 472, at p. 484, but it is according to the decision between the same parties 22 U. C. R. 80, and it is from my reading of the Statutes the construction to be put upon them.

It must be a most servicable duty if the different statutes which have been referred to, and which embarrass what should be a very plain subject, by so many different provisions, were reduced to some order and connection by a single enactment.

The parties may now be able to settle between themselves the matter in controversy. There will be no costs on either side. The final disposal of the rule will remain over until we know whether it is possible to make an arrangement without appealing further to the Court.

THE JOSEPH HALL MANUFACTURING COMPANY V. HARNDEN
ET AL.

Promissory note—Stamps—Affixing double duty—Payee a “subsequent party.”

Held—following *Wooley et al. v. Hunton et al.* 33 U. C. R. 152, and dissenting from *Escott v. Escott*, 22 C. P. 305, that a payee is a “subsequent party” to a promissory note, within the meaning of 31 Vic. ch. 9, sec. 12, who may pay the double duty provided by that section.

The plea was, that at the time of making the note no adhesive stamp or stamps whatever were affixed to the note; to which the plaintiff replied that they paid double duty “by affixing to the note stamps to the amount of double duty payable in respect thereof.”

Quere, whether the plea should not also have denied that the note was written on stamped paper; and *semble* that the replication should have stated the amount in stamps affixed.

APPEAL from the County Court of Ontario.

Declaration by plaintiffs as payees on a promissory note made by the defendants.

Third plea, by two of the defendants: that at the time of making the note no adhesive stamp or stamps whatever were affixed to the note according to the statute.

Replication: that when the plaintiffs became the holders of the note they had no knowledge that the proper duty had not been paid by the proper party, or at the proper time, and that they paid double duty so soon as they acquired such knowledge, by affixing to the note stamps to the amount of double duty payable in respect thereof.

Demurrer, because the plaintiffs were parties to the note at its making, and were not subsequent parties within the statute, so as to make valid the note by their attaching double stamps.

The case was argued before the learned Judge of the County Court, who gave judgment for the defendants, on the authority of the case of *Escott v. Escott*, 22 C. P. 305; and the plaintiffs appealed.

English, for the appellants, referred to 33 Vic. ch. 13, sec. 12, and to *Woolley et al. v. Hunton et al.*, 33 U. C. R. 152, as a decision in his favor, and opposed to the case of *Escott v. Escott*.

J. W. Kerr, contra, relied on the case on which the learned Judge had given judgment in the Court below.

WILSON, J., delivered the judgment of the Court.

It is not certain the plea is good, because it does not deny that the note was written on stamped paper, although the 10th section of the Act of 1867, says, "stamps upon the paper shall be deemed to be affixed thereto for all the purposes of this Act," for these words may not have the very general meaning which they may seem to bear, when the section where they are found and the context are considered. No notice of exception was taken to the plea.

The replication is open to objection also, for making the amount of double duty a matter for trial by the jury, in place of saying what amount, in particular, in stamps, was affixed. The jury can tell, as a fact, whether stamps to the particular amount were attached, but they cannot legally tell what the proper amount of the double duty was. No exception was taken to the replication on that ground.

We pass over both these grounds. The question is, can the payee of a note, when he gets it from the maker, who has not attached the proper stamps to it, make it available as a valid note against the maker by attaching double stamps to it? Is he a subsequent party, within the statute, to the note?

In *Escott v. Escott*, 22 C. P. 305, it was held by the Common Pleas that the payee was not a subsequent party, and that he could not make a note which the maker had not stamped valid by affixing the double stamps.

In *Woolley et al. v. Hunton et al.*, 33 U. C. R. 152, we thought otherwise. The Common Pleas decision was the earlier one, and we were not aware of it when we pronounced our own.

31 Vic. ch. 9, sec. 10, enacts, "The stamp or stamps required to pay the duty hereby imposed shall in the case of any promissory note * * made or drawn within Canada, and not made upon paper stamped to the amount of the duty, be affixed by the maker or drawer thereof * * and such maker or drawer * * failing to affix such stamp or stamps at the time of making, * * or affixing stamps of insufficient amount, shall thereby incur a penalty hereinafter imposed; and the duty payable on such instrument, or the duty by which the stamps affixed fall short of the proper amount, shall be doubled."

The 33 Vic. ch. 13, sec. 1, D., then enacts: "If any person in Canada makes, * * *becomes a party to*, or pays any promissory note, * * chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of one hundred dollars, and, save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or in equity

* * But no party to, or holder of, any such instrument, shall incur any penalty by reason of the duty thereon not having been paid at the proper time, and by the proper party or parties, provided at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double or additional duty as in the next section provided, as soon as he acquires such knowledge."

It appeared to us that the maker of the note was the first party to it. He is the one who is primarily liable upon it; the others, the indorsers,—and the same rule applies when the payee is an endorser,—are liable second-

arily, and contingently only upon the failure of the maker to pay.

A note may be payable to one who happens but is not known to be dead at the time, and may be delivered by the maker to another for the payee, and if there be an intestacy, there is no one then capable of suing until administration is taken out. When that is done the administrator may sue in his own name: *Murray v. The East India Company*, 5 B. & Al. 204. Is the administrator a subsequent party in such a case?

Now observe the 11th section of the statute, and it will be found that if the payee become a party to the note whenever it is made, and the maker do not pay the duty on it the instant he makes it, the payee, although not present at the time, and though he had no knowledge of its making, becomes liable to the penalty of \$100, unless he can pay the double duty as a subsequent party.

If the payee in such a case is to be considered as becoming a party when he first gets the note, or accepts it, or knows of it, then he can by attaching the single stamp avoid the penalty, and if by his then accepting it he makes the note then valid for the first time, so that it can be considered as being in law then made, he must have the right to attach the stamps.

We do not see any thing inconsistent in holding the payee to be a subsequent party to a note in order to make it valid as against the maker, and to enable him for that purpose to attach the double stamps to it, which the maker may have omitted wilfully or otherwise to put upon it.

It is a forced construction, and in many cases contrary to the fact, to hold that the payee must always be or be supposed to be present when the note is made.

In our opinion the judgment of the Court below should be reversed, and judgment be ordered to be entered for the plaintiffs on the demurrer.

Appeal allowed.

DULLEA V. TAYLOR.

Contract—Notice of intention not to perform—Right to sue.

Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue.

Declaration: that the plaintiff agreed to sell and defendants to buy certain land in Oshawa, adjoining the lands of the plaintiff, which would be thereby enhanced in value to the plaintiff, for \$325, upon the following terms: the money to be paid and the conveyances executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware; and that in case he should not do this he would at the expiration of said eighteen months reconvey the land and receive back the purchase money. And all things happened and all times elapsed, &c., and plaintiff was ready to convey, yet defendant did not pay the plaintiff, nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c.

Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware on the said lot, and with the intention of procuring said land as a site for their factory in case the company should decide to erect it thereon; that the plaintiff knew this when he made the agreement; and before any demand by the plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave notice thereof to the plaintiff and that they would not require said land, and that the plaintiff was released; and defendant did not otherwise abandon said agreement.

Held, following *Hochster v. De La Tour*, 2 E. & B. 678, that the declaration was good, and the plea no answer to it.

DECLARATION: that by an agreement bearing date 10th March, 1873, it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant, and the defendant should purchase from the plaintiff, a certain parcel of land in the village of Oshawa particularly described in said agreement, being part of and adjoining to other land of the plaintiff in the said village, which said other lands of the plaintiff would become of much greater value in consequence of the sale of the said parcel to the defendant, and the erection thereon of the building hereinafter mentioned, at and for the price of \$325, upon the terms and conditions following, that is to say, that the said money should be paid and the conveyance of the land executed on demand, and that the defendant should within eighteen months from the date of the said agreement complete upon

the said land a brick factory 100 feet long and from forty to fifty feet wide, and of three stories, or at the option of the said defendant of 150 feet long and from 40 to 50 feet wide, and of two stories, and at and before such completion commence and prosecute therein the manufacture of plated ware on a scale commensurate with the size of the said building; and that in case he should not perform his said agreement in that respect, he would at the expiration of the said eighteen months reconvey the said land to the plaintiff and receive back the said purchase money. And all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part, and to be paid the said purchase money, and the plaintiff was always ready and willing to convey the said land to the defendant on payment thereof; yet the defendant did not pay the plaintiff the said purchase money nor complete the said purchase on his part, but wholly refused so to do, and notified the plaintiff that he abandoned the said agreement, and would not perform or complete the same, or any part thereof; whereby the plaintiff has lost the expense which he incurred in endeavoring to perform the said agreement on his part, and has been put to expense, &c.

Third plea, on equitable grounds: that defendant and others were about to associate themselves as a company for the purpose of manufacturing goods plated with silver, and the defendant was one of the promoters of the said company, and the said agreement was made by the defendant on behalf of the said proposed company, with the intention of procuring the said land as a site for the erection of a building for carrying out the said proposed manufacture, in case the said company or the promoters thereof should decide to erect such a building thereon, the said building being the same building in the said agreement mentioned; and the plaintiff well-knowing the premises made the said agreement; and after the making of the said agreement, and before any demand had been made by the

plaintiff for payment of the said purchase money, and before any conveyance of the said land had been made or executed by the plaintiff, and before any demand had been made by the plaintiff, upon the defendant to receive or accept such conveyance, the defendant and the other promoters of the said company decided not to erect the said proposed building upon the said land, and the defendant gave notice in writing to the plaintiff of the said decision, and that the said land would not be required by the said proposed company, and that the plaintiff was released from the said agreement; and the defendant did not otherwise than as in this plea mentioned ever abandon the agreement, or refuse to perform his part thereof.

Demurrer to the plea, upon the grounds:—1. That said plea is merely a plea to damages; that it discloses no defence to an action at law, and at most only an answer to a bill for specific performance.

2. That it is not alleged that it was any part of the agreement that the same should not be carried out if the company did not decide to erect the building in the said plea mentioned.

3. That the plea discloses no facts upon which a Court of Equity would grant an absolute unconditional injunction against the maintenance of the action.

The defendant joined in demurrer, and took the following exception to the declaration:—that the effect of the agreement set out is, that the sale was to be rescinded if the proposed building was not completed within eighteen months, and the declaration either shews that the sale was rescinded or that the action has been brought too soon.

Harrison, Q. C., for the plaintiff. The declaration shews a good legal cause of action, and the plaintiff is, at all events, entitled to recover something. The plea is no answer to the declaration. It does not shew that if the deed were accepted it would be a release of all causes of action. He cited *Hochster v. DeLaTour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Roper et al. v. Johnston*, L. R. 8 C. P. 167.

C. S. Patterson, Q. C., contra, urged the exception taken to the declaration, and contended that the plea was an answer.

MORRISON, J., delivered the judgment of the Court.

The plaintiff is entitled to our judgment in this case upon the authority of *Hochster v. De La Tour*, 2 E. & B. 678, which decides that where a party before the time stipulated for the performance of a contract has arrived declares that he will not perform it, the other party may treat that declaration as a breach of the contract, and sue for it.

That state of things appears upon this declaration, and the plea admits or rather shews the like facts, and is no answer.

Judgment for plaintiff.

GILCHRIST ET AL. V. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Fire Insurance—Further insurance by stranger—C. S. U. C. ch. 52, sec. 28.

Sec. 28 of the Mutual Insurance Act, C. S. U. C. ch. 52, makes a policy voidable "if insurance on any house or building subsists in the Company and in any other office, or by any other person at the same time," without the consent of the Company; and it was a condition of the policy that further insurance by the plaintiff, or any other person, should render the policy void.

Held, that the further insurance must be by the same person who has before insured, or in the same interest.

DEMURRER. Action on a Policy of Fire Insurance under seal, dated 6th September, 1870, granted to the plaintiffs upon a dwelling house, for one year, in the sum of \$400, and renewed for another year,—averring loss by fire.

Plea: that the policy was subject to a condition expressed therein, that further insurance on the said property by the plaintiffs or any other person should render the said policy void; and that one David Thompson, who was interested in the property, did, after the making of the said policy and before the said fire, effect a further insurance on the

said property with the Beaver and Toronto Mutual Fire Insurance Company, by reason whereof the said policy became void.

The third and fourth pleas raised precisely the same question.

Demurrer to the three pleas, on the ground that the condition mentioned referred to subsequent insurances by the plaintiffs and other persons in privity with or claiming under them; and a subsequent insurance by a person not shown to be in privity with or claiming under or through the plaintiffs, was not a breach of the condition. Joinder.

Osler, for the demurrer. The condition and the Mutual Insurance Act, Consol. Stat. U. C. ch. 52, sec. 28, must be read as applicable to subsequent or double insurances by the same person, or by those claiming under him.

The case of *Burton v. The Gore District Mutual Fire Insurance Co.*, 14 U. C. R. 342, a decision to some extent in favour of the company, though not in point here, was not concurred in but was directly departed from by the Court of Chancery, when the parties in the last mentioned case, transferred their litigation into that Court. The case in equity will be found in 12 Grant 156; See also *The Ramsay Woollen Cloth Manufacturing Co. v. The Mutual Fire Insurance Co. of the District of Johnstown*, 11 U. C. R. 516; *Merritt v. The Niagara District Mutual Fire Insurance Co.*, 18 Q. B. 529. Thompson is in no way identified in interest with the plaintiff, and the plaintiff cannot be held to have lost his policy by the act of a stranger.

C. S. Patterson, Q. C., contra. Under a condition against further insurance, such pleas as these could not be sustained; *Park v. The Phoenix Insurance Co.*, 19 U. C. R. 110. But the 28th section of the Statute does appear to have provided against further insurances being effected on the same property, no matter by whom made. The words are, "If insurance on any house or building subsists in the Company, and in any other office, or by any other person at the same time," the insurance in the Company shall be voidable, (as amended by 27-28 Vic., ch. 38, sec. 4), at

the option or in the discretion of the directors, unless the double insurance subsists with the consent of the directors signified by endorsement on the back of the policy, signed by the President and Secretary." He also referred to *Leavitt et al. v. Western Marine and Fire Ins. Co.*, 7 Robinson, La. 351; *Massey v. Atlas Mutual Ins. Co.*, 4 Kernan, N. Y., 79; *Clarke's Digest of Insurance Cases*, 2nd ed., 391-403.

WILSON, J., delivered the judgment of the Court.

In the case of *Burton v. The Gore District Mutual Fire Insurance Co.*, 14 U. C. R. 342, the condition was, that in case of subsequent insurance on property insured by the Company, notice thereof must be given to the Company, &c., in default whereof such policy should thenceforth cease and be of no effect.

The facts were that Montgomery, the owner in fee, insured. After he got his policy, he mortgaged the insured premises and assigned the policy to Burton; he then made a further insurance on the same property; and it was held that this second insurance by Montgomery, under the condition above stated, defeated the first insurance, the policy for which had been before assigned to Burton, although the Company had duly accepted of Burton as the assignee of the policy sometime before the fire.

The Court of Chancery in *Burton v. The Gore District Mutual Fire Insurance Co.*, 12 Grant 156, decided that Montgomery could not in equity by his act defeat the rights he had before his second insurance conferred on Burton; but that his second insurance invalidated his own rights and interests.

We are not called on to express any opinion of the decision by this Court in the case of *Burton v. The Gore District Mutual Fire Insurance Co.* It is sufficient to say, that the facts are not alike in this case and in that.

Mr. Justice Burns, at page 363, was of opinion that Burton would not have been affected by the act of Montgomery at all, if he had taken out a new policy in his own

name, in place of taking an assignment of the former policy. We do not say what merit there is in that distinction, but such as it is it is in favor of these plaintiffs.

Thompson had no interest in the plaintiffs' policy, and in that view, according to what Mr. Justice Burns said, nothing that Thompson could do as an independent party to the policy could prejudice the rights of the plaintiffs, which are protected by it.

The further insurance "by the plaintiffs or any other person" referred to in the condition, cannot possibly mean, by the words "any other person," a perfect stranger to the plaintiffs and to the property, a person having power to destroy the rights of others, and who is in no way in privity with the plaintiffs.

A further insurance must mean by the same person or in the same interest as the person who has before insured.

Separate insurances by persons having different interests in the same property cannot benefit the parties, nor can they harm the insurers.

One of the persons insured may be a tenant for twenty years. The other may have the immediate reversion in fee.

Each can only recover a compensation for and in respect of his own interest; he neither gains nor loses by what the other may do with respect to his interest.

So when the insurance company pays a loss, it should pay to each of the insured—the tenant in possession and the reversioner—his own particular loss, and in so doing the company will be paying no more than the single insurance on the separate interests, the aggregate of which will be no more than the equivalent of a single risk upon the conjoint interest or fee simple value of the property.

That may be the exact state of things here, for all that is disclosed upon the pleadings.

It is not possible that a tenant for years who wants to provide a fund to repair or rebuild in case of loss by fire, and who insures for that purpose, can have his object defeated by his landlord insuring the reversion, upon a clause so worded as this one is.

Suppose the case of a tenant for years ; landlord, tenant for life and immediate reversioner; and remainder to a third person in fee. If the argument of the defendants be sound and reasonable—or sound only, for perhaps they care not much about its reasonableness—and if the final reversioner, after the tenant for life had made a lease and the tenant for years had insured, were to insure, he would defeat the prior insurance of the tenant for years. It might be said, if the tenant for life had insured, and if his tenant were bound to repair or rebuild on loss by fire, that he could not enforce the covenant against his tenant, at any rate to the extent of the tenant's policy, if he by his later insurance had defeated the tenant's prior insurance.

However that may be, it is plain in the case above supposed, where there were three persons, tenant for years, and reversioners for life, and in fee, the subsequent insurance by the reversioner in fee, although it defeated the policy of the tenant for years, could not prevent the tenant for life from suing the tenant for years on his covenant to rebuild in case of loss by fire ; and so the tenant in possession would be deprived by the direct act of one interested in the premises of the fund which he had done all in his power to secure, in case the contingency arose when it should be necessary to resort to it ; and at the same time he would be left helplessly exposed to an action for damages for not doing the act which he was prevented from doing.

Different language from that which has been used must be used to justify such a state of things.

If companies do mean to enforce a condition which will do so much injustice, they must take care to use language which will distinctly warn the applicant of the slender chance he has of ever being paid his loss, and of the power which another person has, whom he cannot control, to defeat his policy at any time, wantonly or otherwise, without his even knowing it.

There will be judgment on demurrer for the plaintiffs.

Judgment for plaintiffs.

REGINA V. SCOTT.

License required by Brewers—31 Vic. ch. 8, D.—32 Vic. ch. 32, sec. 1, O.—
33 Vic. ch. 2 sec. 1, O.

A brewer licensed as such by the Government of Canada, under 31 Vic. ch. 8, D, requires no license under the Tavern and Shop License Act of Ontario, 32 Vic. ch. 32, sec. 1, as amended by 33 Vic. ch. 28, for selling ale manufactured at his brewery.

The clause allows the selling by wholesale only, "in casks or vessels containing not less than five gallons each." *Quære*, whether a sale of more than five gallons put up in quart bottles, would contravene the Act. *Semble*, not, for that the object was to prevent sales of less than five gallons.

Whether the statute, if applicable to licensed brewers, would have been within the power of the Provincial Legislature, was a question raised, but not decided.

DURING this term, *C. Robinson*, Q. C., on behalf of Samuel Scott, the defendant, obtained a rule calling upon James Cahill, Esquire, Police Magistrate of the City of Hamilton, and John Moore, (the complainant) to shew cause why the conviction made on the 12th of August, 1873, by the said James Cahill, whereby the said Samuel Scott was convicted of having sold spirituous liquors, to wit, two dozen bottles of ale, each bottle containing only a quart, without having first obtained a license authorizing him to do so, and was fined \$20 and costs, should not be quashed and set aside, upon the grounds that—the said Samuel Scott being at the time of the said alleged sale a brewer duly licensed by the Government of Canada, keeping no tavern or shop, and the said sale having been made to a duly licensed shop keeper, of ale manufactured by the said Scott,—the said conviction was unauthorized by law, contrary to the statutes in that behalf, and made without jurisdiction on the part of the said magistrate; and that the statutes, if any, passed by the Legislature of Ontario, authorizing such conviction, were and are unconstitutional and beyond the power of the said Legislature to enact.

The rule was drawn up on reading the *certiorari* for the return of the conviction, the return thereto, and the conviction, recognizance and papers attached to the *certiorari*,

together with the affidavits and other papers filed in Chambers upon the application for the said *certiorari*, and refiled on this application by leave of this Court.

It appeared that the defendant Scott was a duly licensed brewer under the provisions of the 31 Vic. ch. 8, D., carrying on business in the City of Hamilton; and that on the 29th July last, at his brewery in Hamilton, he sold to one Walker, a customer of the defendant, and a licensed retail shop keeper in Hamilton, two dozen bottles of ale manufactured by Scott at one time, and which was sent and delivered to Walker at his shop. The two dozen bottles contained in all more than five gallons.

On the 4th of August last, an information made before the Police Magistrate was laid against Scott, for unlawfully selling two dozen bottles of ale without a license, each vessel containing less than a quart, and on the 12th of August he was convicted, for that he, Scott, "did sell spirituous liquor, to wit, two dozen bottles of ale, each bottle containing only a quart, without having first obtained a license authorizing him to do so;" and was fined \$20 and costs.

Mackelcan shewed cause. This is an ordinary conviction for selling liquor without a license, and is supported by the Ontario Acts, 32 Vic. ch. 32; 33 Vic. ch. 28; and 36 Vic. ch. 34. 32 Vic. ch. 32, sec. 1, O., is explicit, and provides that "No person shall sell by retail any spirituous, fermented or other manufactured liquors within the Province of Ontario, without having first obtained a license authorizing him so to do, as hereinafter provided." And the amendment by 33 Vic. ch. 28, sec. 1, only excepts brewers licensed by the Dominion as to sales "by wholesale only," and "in casks or vessels containing not less than five gallons each." The British North America Act, sec. 92, sub-sec. 2, gives power to the Local Legislature to impose taxes to raise a revenue for Provincial purposes, and the fact that the Dominion Government has imposed a tax upon any class of persons or property, does not prevent a Local Government from raising a revenue from the same

sources. Sub-sec. 9 of the same section authorizes the Local Legislature in express terms to deal with licensing the liquor trade and the right to impose excise duties given to the Dominion Government cannot abridge this power. No reason can be suggested why brewers should be allowed to sell as they please. It may seem at first sight unreasonable that brewers should be allowed to sell five gallons in one cask, and not the same quantity at the same time in smaller vessels, but the Legislature may have had in view the temptation which the possession of the ale in bottles would be to the brewers to sell in small quantities.

C. Robinson, Q. C., contra. This conviction is not authorized by any Act of the Ontario Legislature, and if it be, the Act itself is unauthorized.

The second ground, however will probably become immaterial for it seems clear that the Provincial Legislature never intended to require a license in such a case as the present, and their enactments will not bear any such construction. The statutes to be referred to are 27-28 Vic. ch. 18, "*The Temperance Act of 1864*;" The Municipal Act of 1866, 29-30 Vic. ch. 51, sec. 252; 32 Vic. ch. 32, O., as amended by 33 Vic. ch. 28, O.; and the 36 Vic. ch. 34, O. The Temperance Act of 1864, sec. 12, states what effect a prohibitory by-law under that Act shall have, and the proviso in sub-sec. 3 shews that even in municipalities where such a by-law is in force a brewer may sell in quantities not less than five gallons at a time, without regard to the contents of each vessel. This Act is still in force. See the Municipal Act of 1873, sec. 372, sub-sec. 14. The 32 Vic. ch. 32, O., is entitled: "An Act respecting Tavern and Shop Licenses," and recites that "it is expedient to amend and consolidate the several enactments relating to tavern and shop licenses." It is plain therefore that brewers were not within its contemplation, and the different provisions made by it, with which no brewers could comply, shew this clearly. Sec. 1, therefore, which enacts that "No person shall sell by retail any spirituous, fermented, or

other manufactured liquors within the Province of Ontario, without having first obtained a license authorizing him so to do as hereinafter provided," had no application to defendant. The 33 Vic. ch. 28, sec. 1, however, repealed that section, and substituted another section, containing the same enactment, with a proviso added, "that nothing in this Act contained shall prevent brewers and distillers, duly licensed by the Government of Canada, from selling, by wholesale only, spirituous, fermented, or manufactured liquors in casks or vessels containing not less than five gallons each." The proviso was either unnecessary or unauthorized, and the Legislature appear to have so considered, for by the 36 Vic. ch. 34, sec. 1, O., "An Act to amend the Acts respecting Tavern and Shop Licenses," a more comprehensive provision is made against keeping liquors for sale "in any place whatsoever," unless duly licensed under the provisions of the said Acts; "but," it is added, "this shall not apply to brewers or distillers duly licensed by the Government of Canada." The information was laid under sec. 22 of the 32 Vic. ch. 32, O., which makes it an offence to sell liquors "without the license therefor by law required," and no license being required for the sale made here by the defendant the conviction cannot stand. The contention on the part of prosecution would be destructive to the business of brewers. They deal largely in bottled ale and beer, which they send into different municipalities, and it would be impossible for them to take out a license in each one. But if the statute could be held to apply to the defendant the sale here was not within its spirit or intention, even, if within the strict letter. The object was to prohibit the sale of quantities less than five gallons, however put up, and the sale of six gallons in bottles, which might all be contained in one cask or package, would not contravene it.

The enactment if applicable in this case, is beyond the power of the Local Legislature. By the British North America Act, sec. 91, the Parliament of Canada has exclusive jurisdiction over "The Regulation of Trade and Commerce." The

Inland Revenue Act, 31 Vic. ch. 8, D, under which defendant was licensed, regulates breweries and provides for the sum to be paid for a license for brewing. The Provincial Legislature by sec. 92 of the British North America Act, have exclusive jurisdiction over "Shop, Saloon, Tavern, Auctioneer, and other Licenses, in order to the raising of a Revenue for Provincial, Local, or Municipal purposes," but they cannot under this assume to require a license from a brewer, and place him under regulations which would in effect make his license from the Government of Canada useless.

MORRISON, J., delivered the judgment of the Court.

The conviction complained of by the defendant is one made under the provisions of the 22nd sec. of 32 Vic. ch. 32 of Ontario, which enacts that "Any person who shall sell or barter spirituous, fermented, or manufactured liquors of any kind, or intoxicating liquors of any kind, without the license therefor by law required, shall, for the first offence, on conviction thereof, forfeit and pay a penalty of not less than \$20, besides costs." And the question arises, whether a licensed brewer who sells ale at his brewery manufactured by him, in the way charged against this defendant, is guilty of an offence within that section, and liable to the penalty.

It is conceded that the defendant is a brewer licensed by the Dominion Government under the provisions of the Dominion Statute, 31 Vic. ch. 8; but it is contended, that notwithstanding such license, he is within the Ontario Act, 32 Vic. ch. 32.

The first section of that Act, as amended by the 33 Vic. ch. 28, enacts, "No person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors, within the Province of Ontario, without having first obtained a license, authorizing him so to do as hereinafter provided; Provided always, that nothing in this Act contained shall prevent brewers and distillers, duly licensed by the Government of Canada, from selling by wholesale

only, spirituous, fermented, or manufactured liquors in casks or vessels, containing not less than five gallons each."

Now 32 Vic. ch. 32, is entitled, "An Act respecting Tavern and Shop Licenses," and its preamble recites that it is expedient to amend and consolidate the several enactments relating to Tavern and Shop licenses.

A brewer, as this defendant is, obtains a license to brew beer, ale, porter, &c.; and neither in the statute which authorizes the license, the 31 Vic. ch. 8, D, nor in any other statute of the late Province of Canada, can I find any restriction as to the sale of beer, &c., manufactured by a licensed brewer, except in the 27-28 Vic. ch. 18, D., the Act authorizing the municipalities in Upper Canada to pass by-laws prohibiting the issue of licenses and the sale of intoxicating liquors within municipalities.

By sec. 12, sub-sec. 3 of that Act, it is provided, "that any licensed distiller or brewer, having his distillery or brewery within such county," (the municipality prohibiting the issuing licenses and the sale of liquors) "may thereat expose and keep for sale such liquor as he shall have manufactured thereat, and no other; and may sell the same thereat, but only in quantities not less than five gallons at any one time, to be wholly removed and taken away therefrom in quantities not less than five gallons at a time; and provided also that any such licensed brewer may sell bottled ale or porter of such manufacture in quantities of not less than one dozen bottles of at least three half pints each at any one time, to be wholly removed and taken away in quantities not less than one dozen such bottles at a time."

Neither is there any prohibition or restriction upon the sale of ale, &c., by a brewer in the Ontario Act 32 Vic. ch. 32, except what may be said to be implied from the proviso to the first section as amended, that proviso merely providing that nothing in the Act shall prevent a licensed brewer or distiller from selling by wholesale only, (not restricted to the articles manufactured by them, as in the Temperance Act, but generally), spirituous, fermented, or

manufactured liquors in casks or vessels, containing not less than five gallons each; impliedly authorizing brewers and distillers to sell all kinds of liquors; for by the 37th section of the Act the word "liquors" has a most comprehensive meaning.

It was contended on the part of the prosecutor, that under the proviso to the first section of the Act, a brewer is prohibited from selling any quantity of ale in bottles or casks or vessels, if the bottles or casks did not each contain at least five gallons; in other words, a brewer could not sell one hundred gallons of ale at one time if such ale was bottled ale in quart bottles, or say fifty gallons of ale forty-six gallons being in one cask and four gallons in another, without being liable to the penalty contained in the 22nd section; in effect, that what the Legislature had in view was not the sale of ale in quantities over five gallons, but the size of the casks or vessels or bottles in which it was sold.

If the case turned upon the construction to be given to the proviso in that respect, I do not think we could reasonably hold that such was the object or intention of the Legislature.

What the Legislature, in my judgment, had in view, was restricting brewers to the sale of ale, &c., by wholesale only, and fixing the minimum quantity at five gallons. It is true that upon a literal reading of the proviso, the construction contended for by the prosecutor might be given to it; but so might it be construed to authorize a sale of bottled ale packed in casks or vessels containing, or capable of containing, five gallons each.

And it seems to me the proviso would not prevent a brewer selling to his customer at his brewery fifty gallons or five gallons in a cask, and after being purchased the customer could have it bottled at the brewery before removing it to his, the customer's, premises. It is not an offence to bottle ale.

But whatever may have been the intention of the framers of the proviso, whether to restrict the brewer or

to extend his power of selling to other liquors besides those manufactured by himself, when we come to look at the 22nd section, which imposes the penalty, it is not applicable to a duly licensed brewer. It does not enact that any person selling without a tavern or shop license, (the licenses authorized and contemplated by the Act), or a license issued by virtue of the statute, shall be subject to the penalty. The language is, "Any person who shall sell, &c., without the license therefor by law required." Now the defendant had a license under 31 Vic. ch. 8, D., as a brewer, and it seems to us that it cannot be said that the selling, at his brewery, ale manufactured by him under that license was a selling without the license by law required.

The very proviso which is invoked against this defendant recognises the licensing a brewer by the Government of Canada, and what other license could a brewer have?

There is no provision that he shall take out either a shop or tavern license; and under the 7th section of the Inland Revenue Act, a brewer is prohibited carrying on his business in any other house or premises other than that mentioned in his application for a license; and by the 12th section, no such license shall be granted for carrying on such business as a brewer, "in any building which forms part of, or is appurtenant to, or which communicates by any common entrance with, any shop or premises wherein any article to be manufactured under such license is sold by retail or wherein there is kept any broken packages of such article," evidently shewing that the Legislature intended that brewing or distilling could only be carried on as a separate and distinct business.

In our opinion the 22nd section, which imposes the penalty, does not embrace a case of this nature, and the conviction on that ground ought to be quashed.

The question of the constitutional right of the Ontario Legislature to impose upon brewers the necessity of taking out a license, as such, or to restrict them in the sale of ale or beer of their own manufacture, was raised on the argu-

ment. Grave difficulty may hereafter arise as to the meaning and interpretation to be given to the words: "The Regulation of Trade and Commerce" in the 91st section of the British North America Act, as subjects under the exclusive authority of the Parliament of the Dominion.

These words have a very wide signification, and when a judicial construction has to be given to them in connection with the powers given to the Local Legislature, it will probably be found very difficult to give to those words an accurate or satisfactory definition. However, in the present case it is not necessary to consider them.

Rule absolute.

REGINA V. LENNOX.

32 Vic. ch. 32, sec. 25, O—*Conviction under—Commencement of prosecution.*

Laying the information is the commencement of a prosecution before a magistrate.

Sec. 25 of 32 Vic. ch. 32, O., provides that "all prosecutions under this section shall be commenced within twenty days after the commission of the offence, or after the cause of action arose, and not afterwards." The information against defendant was taken on the 30th Dec., 1872, laying the offence on the 16th Dec. On the 15th January, 1873, a summons was issued on the information, and on the 30th the defendant was tried and convicted. *Held*, that the prosecution was commenced in time.

When the delay in proceeding after laying the information is great and defendant seriously prejudiced thereby, he might perhaps obtain relief from the Court.

MOTION to quash a conviction of the Police Magistrate of Toronto, under 32 Vic., ch. 32, sec. 25, O., for selling liquor without the license therefor by law required.

The only question raised was, whether the prosecution, which resulted in the conviction of the defendant, was commenced within the twenty days prescribed by sec. 25 before referred to; and the determination of the question depended on whether laying the information could be considered the commencement of the prosecution.

The proviso in section 25 is, "And all prosecutions under this section shall be commenced within twenty days after the commission of the offence, or after the cause of action arose, and not afterwards." The section, also, takes away the right of appeal as to convictions under it.

The papers were removed into this Court by *certiorari*, and from them it appeared that the information was taken on the 30th of December, 1872, the charge in it being that the defendant within twenty days then past, to wit, on the 16th of December, 1872, did sell or barter spirituous manufactured or intoxicating liquors, without the license therefor by law required.

A summons was taken out, directed to defendant and others, on the 15th of January, 1873, and served on defendant the same day, which recited that information was laid before the Police Magistrate, that he, the defendant, did within the past twenty days, to wit, on the 16th December, 1872, sell," &c., as before stated. The summons required defendant to appear on the 16th January, 1873, and the defendant was tried and convicted on the 30th January, 1873.

In Hilary Term *E. E. W. Hurd*, obtained a rule *nisi* calling on the convicting justice and the informer to shew cause why the conviction should not be quashed, on the grounds that there was no jurisdiction on the part of the magistrate to hear the case or convict the defendant, as the prosecution was not commenced within twenty days from the commission of the alleged offence, according to the provision of the statute.

In Easter Term *N. Murphy* shewed cause. The conviction is right. Laying the information is a commencement of the prosecution within the statute, and that was done within the twenty days prescribed. *Regina v. Barret*, 1 Salk. 383 was a conviction for deer stealing, and it was objected that the conviction appeared to be a year after the day of the information; but it was held sufficient if the information were prosecuted within a year from the fact, for that, it was held, was a good commence-

ment of the suit, and from that the computation is made in all cases. In *Tunnickliffe v. Tedd*, 5 C. B. 553 on a complaint before two magistrates for assault and battery, where defendant appeared and pleaded not guilty, and complainant then stated that he would not go on with the prosecution, and the justices dismissed the complaint, it was held that there had been a hearing of the case and that the magistrates' certificate of dismissal was a bar to the action.

Vaughton v. Bradshaw, 9 C. B. N. S. 103 shews, that in such a case, if the prosecutor notified the magistrate and the defendant, before the day of hearing, that he did not intend to proceed before the justice, nevertheless the defendant had a right to appear and ask the magistrate to dismiss the complaint.

In this case Chief Justice Erle, referring to the case of *Tunnickliffe v. Tedd*, 5 C. B. 553, said at p. 115, "the Court lay down as principles, that the information is the commencement of a criminal proceeding, analogous to an indictment; that the summons is the act of the magistrates on behalf of the public; that the party who begins a criminal proceeding cannot withdraw from it leaving it pending, but, on the contrary, that the party charged has a right to force it on to a conclusion." He also referred to *Paley on Convictions*, p. 50.

Hurd, contra. The right of appeal being taken away the statute ought to be strictly construed. If it is held that the complaint being made within twenty days is a commencement of a prosecution under that act, the information after being taken may be retained for a year, and the defendant be deprived of the advantage of having notice of the case promptly, so as to prepare for his defence.

In *Regina v. Austin*, 1 C. & K. 621, it was held that where the warrant of commitment was dated 11th December, 1844, and the offence was committed on 12th January, 1844, the prosecution was commenced within twelve calendar months after the commission of the offence.

In *Rex v. Wallace*, 1 East, P. C. 186, it was held that the information and proceedings before the magistrate were the

commencement of the prosecution and not the preferring of the indictment. There, undoubtedly, the person had notice of the charge before the time for commencing the prosecution had expired.

In *Rex v. Phillips et al.*, R. & R. 369, where it was necessary that the prosecution should be commenced within three months, the prisoners were apprehended within three months, but the preparing of the indictment was after that period. The Judges were of opinion there was no sufficient evidence that the prisoner was apprehended on the charge for which he was tried within the three months after it was committed, and directed an application for a pardon. See also *Oke's Magisterial Synopsis*, 10th ed., 105; *Regina v. Brooks et al.*, 2 C. & K. 402.

RICHARDS, C. J., delivered the judgment of the Court.

In *Tunnickliffe v. Tedd*, 5 C. B. 553, there was a summons issued and served on the defendant, and both parties appeared, so that there could be no doubt the proceedings had been commenced.

In *Vaughton v. Bradshaw*, 9 C. B. N. S. 103, Chief Justice Erle is reported to have said, at p. 115, "that the Court in that case lay down as principles, that the information is the commencement of a criminal proceeding, analogous to an indictment; that the summons is the act of the magistrates on behalf of the public; that the party who begins a criminal proceeding cannot withdraw from it leaving it pending."

What Coltman, J., said in *Tunnickliffe v. Tedd*, 5 C. B. 560, was: "It appears to me that the proceeding in this case is analogous to the ordinary case of an indictment. * * Here, the complaint having been lodged, and the defendant having appeared and pleaded, I do not see what right the complainant had to withdraw the charge."

And in the case of *Vaughton v. Bradshaw*, 9 C. B. N. S. 103, the defendant was summoned. The magistrate had issued the summons, which was served, and then the prosecutor could not withdraw from the proceeding.

The issuing of the writ in a civil suit is the commencement of the action, and the proviso would be of little practical use to defendants if an informer could lay an information and allow it to remain a year without issuing a summons, and then proceed with the prosecution.

There is an obvious distinction in the case when a prosecutor has lodged his complaint and a summons has been issued on it and served on a defendant, and when a complaint has been made and the summons not issued.

Suppose, after laying an information and before any summons issued, the prosecutor had, with the consent of the magistrate, withdrawn the charge, could a defendant then insist on the magistrate dismissing the case, merely because an information had been lodged, and would it be held that such information was like an indictment as to which the defendant might, at any sittings of the magistrate, demand to be acquitted, as no evidence was brought against him?

Then suppose an informer having lodged his complaint withdrew it, and afterwards, and after the time for commencing the prosecution had passed, and it was too late for him to lay another information, went before the magistrate and desired to proceed on the stale information, would that be commencing a prosecution within the twenty days?

Or, suppose he swore to a complaint before a magistrate, and kept it in his own possession for a month, and then asked the magistrate to issue a summons on it, would that be sufficient under the statute?

I do not think in these cases the spirit of the Act would be complied with.

It appears to me, that what is meant is, that it is to be commenced and proceeded with with reasonable expedition, in such a way as to bind some one to the proceeding, and by the issue of a summons or warrant against the defendant, to shew that it is really a proceeding intended to be taken against the party within the twenty days, and not something which the prosecutor may proceed with or not as he thinks proper.

On considering the decided cases on the subject, which have been referred to, and many others, we think it the safest course to hold that lodging the information is the commencement of the action.

Perhaps the correct view to take is, that the magistrate, acting as a Judge, and on behalf of the public, in issuing the summons on an information laid before him, will not delay proceedings to the prejudice of a defendant, and, inasmuch as any delay which takes place must necessarily be the act of the magistrate, that the prosecutor cannot be responsible for the delay if the Justice of the Peace neglects or refuses to proceed.

Suppose the prosecutor does all in his power to commence the prosecution within the twenty days, the delays of the magistrate ought not to prejudice him, and the magistrate being a public officer, entrusted with the duty of issuing the summons or warrant, we must not assume unreasonable delay on his part in proceeding.

When such delay takes place, and a party is being proceeded against after such a length of time that he is prejudiced in his defence by absence of witnesses, or other such causes, he may, perhaps, obtain relief by application to the Court.

In *Regina v. Hull*, 2 F. & F. 16, the cases of *Regina v. Willan*, 1 East P. C. 186, *Regina v. Austin*, 1 C. & K. 621, *Regina v. Brooks*, 1 Den. C. C. 217, *Regina v. Phillips*, R. & R. 369, were referred to. It was contended that the evidence, which shewed that a warrant was issued within a week after the commission of the offence, but was never served, because the defendant had absconded, shewed sufficiently that proceedings were commenced within twelve calendar months after the commission of the offence. Pollock, C. B., held that none of the cases cited went to the extent contended for in that case, and directed an acquittal.

I apprehend the recital of the information in the warrant was only secondary evidence of it having been laid within the time required, or having been laid at all.

In *Regina v. Parker and Smith*, 9 Cox C. C. 475, where the charge was night poaching, the offence was committed on the 26th January, 1861. The warrant was dated 5th February, 1861, and recited the information against the defendants, charging them with having committed the offence on 26th January. The arrests took place of Smith on 27th November, 1862, and of Parker on 14th January, 1864. It was objected that the warrant without the information was no legal evidence that proceedings were commenced within twelve months, as required by the statute. The case was argued before the Court of Criminal Appeals. *Regina v. Brooks*, 1 Den. C. C. 217; *Regina v. Austin*, 1 C. & K. 681, were referred to on the argument, also *Regina v. Wallace*, 2 East P. C. 186, *Regina v. Hull*, 2 F. & F. 16, *Regina v. Smith*, 1 L. & C. 131.

In argument it was contended that as the warrant shewed that there must have been a previous information in writing, that information should have been produced to shew the commencement of the proceedings.

Pigott, B., said, "You contend that the warrant is merely secondary evidence of the information." *Regina v. Massey*, 32 L. J. M. C. 21, was cited.

Pollock, B., in giving judgment, at p. 478, said, "We are all of opinion that it was necessary, in order to sustain the prosecution, to give the information in evidence."

The rule obtained by the defendants must be discharged, with costs.

Rule discharged, with costs.

LEVI HUDSON CAMPBELL, an infant by Mary Ann Campbell,
his next friend, v. THE NATIONAL LIFE ASSURANCE
COMPANY OF THE UNITED STATES OF AMERICA.

29 Vic. ch. 17, C.—33 Vic. ch. 21, O.—*Life Insurance—Right of action for Insurance money.*

Defendants, by a policy dated 25th August, 1870, insured the life of James Campbell for \$1000, to be paid at his death to the plaintiff and two others, children of said James Campbell, and to his wife, if living, otherwise to the representatives and assignees of said wife and children.

Held, under 29 Vic. ch. 17, D, and 33 Vic. ch. 21, O, that the plaintiff, on the death of James Campbell, might sue for his, the plaintiff's, one-fourth share separately, without joining the others interested in the policy.

DEMURRER. Declaration : that by a policy of insurance, bearing date the 25th day of August, 1870, made by the defendants—after reciting that in consideration of the representations and declarations made to the defendants in the application therefor, and of the sum of \$5.62 of lawful money well and truly paid before the delivery of the said policy, and of the quarterly annual payments of a like sum, on or before the 25th days of the months August, November, February, and May, to the defendants, or to one of their duly authorized agents as therein provided, in every year during the continuance of the said policy—the said defendants did thereby insure the life of James Campbell, then of the City of Hamilton, in the County aforesaid, to the amount of \$1000 of lawful money ; and the defendants in and by the said policy promised and agreed to pay the said sum insured to the plaintiff and Carrie Augusta Campbell, and one Anson E. Campbell, children of the said James Campbell and Mary Ann Campbell, who was then the wife of the said James Campbell, if living, otherwise to the representatives and assignees of the said wife and children, in sixty days after due notice and the receipt of satisfactory evidence of the death during the continuance of the said policy of the said James Campbell, (any unpaid balance of the year's premium being first deducted therefrom).

The declaration then set out several conditions endorsed on the policy, and averred, that since the making of the said policy, and before the death of the said James Campbell, the said Anson E. Campbell departed this life, an infant within the age of twenty-one years, leaving him, surviving the said James Campbell, the plaintiff, the said Carrie Augusta Campbell, and the said Mary Ann Campbell; by reason whereof the plaintiff is interested in the said sum of \$1000 so insured on the life of the said James Campbell as aforesaid, to the extent of one-fourth part thereof. And the quarterly payment which fell due on the 25th day of February, 1873, was not paid on the day when the same became due, but that afterwards the said defendants waived the said default, and accepted the said payment during the lifetime of the said James Campbell. And whilst the said policy remained in force the said James Campbell died, and all other conditions save the default above referred to, and so waived as aforesaid, were fulfilled and happened, and all things elapsed, &c., yet the defendants have not paid the said sum.

The defendants pleaded, denying the promise as alleged, and the waiver of the default or acceptance of payment during James Campbell's lifetime; and they also demurred, on the grounds, that the declaration does not shew any cause of action in the plaintiff: that the plaintiff's cause of action, if any, is a joint one, and that Carrie Augusta Campbell and Mary Ann Campbell, in the declaration mentioned, should have been joined as co-plaintiffs: that the declaration shews the plaintiff to be an infant, and that if he is entitled to make a separate claim, the action should be brought in the name of the executor of James Campbell, deceased, or if the said James Campbell died intestate, and without having appointed in writing any person to whom such payment might be made on the plaintiff's behalf, the action should be brought by a guardian of the plaintiff duly appointed by one of the Surrogate Courts of this Province.

Joinder.

McKelcan, for the demurrer. There is one cause of action on the policy in the executor, and not several, in the wife and children: *McCollum v. Aetna Insurance Co.*, 20 C. P. 289; *Every v. Provincial Insurance Co.*, 10 C. P., 20. A stranger cannot sue on a contract though made for his benefit: *Tweddle v. Atkinson*, 1 B. & S. 393; *Price v. Easton*, 4 B. & Ad. 433; *Crow v. Rogers*, 1 Str. 592; *Bourne v. Mason et al.*, 1 Vent. 6. Next, there is one consideration, a joint right of action. At common law the plaintiff would have no right to sue; and the Statutes 29 Vic. ch. 17, D., and 33 Vic. ch. 21, O., give no right in express terms. If the plaintiff can sue at all, it can only be jointly with the others, for the policy is one, the contract one, and the consideration single: *Lane v. Drinkwater*, 1 C. M. & R. 599; *Byrne v. Fitzhugh et al.*, *Ib.* 613, note *a*; *Anderson v. Martindale*, 1 East 500; *Hopkinson v. Lee*, 6 Q. B. 964; *Foley v. Addenbrooke et al.*, 4 Q. B. 197; *Pugh et al. v. Stringfield et al.*, 4 C. B. N. S. 364, 369; *Addison on Contracts*, 6th ed., 1043, 1047. 33 Vic. ch. 21, sec. 2, would seem to show that the action was in the guardian.

Burton, Q. C., contra. The general rule is admitted, that a third party cannot sue on a contract though it is made for his benefit, but this does not apply to a policy which is unilateral: *Vadakin v. Soper*, 2 Am. L. C., 5th ed., 163, 185, notes. *Parsons on Contracts*, Vol. I., 5th ed., 466; and if it could apply to policies, the statute intervenes. The first Statute, 29 Vic. ch. 17, D., would have given the plaintiff the action, but beyond doubt 33 Vic. ch. 21, O., must be looked upon as a legislative interpretation of the first statute: *Warwick v. Bruce*, 2 M. & S. 205; *Eccleston et ux. v. Clipsham*, 1 Saund. 153. As to the contract being joint; *Servante et al. v. James*, 10 B. & C. 410. If the Company is unjustly subjected to several actions, that is for the legislature to remedy.

MORRISON, J., delivered the judgment of the Court.

The policy upon which this action is brought, is one

issued under the provisions of 29 Vic. ch. 17, D., and 33 Vic. ch. 21, O.

By the first section of the Act 29 Vic. it is declared that "It shall be lawful for any person to insure his life for the whole term thereof, or for any definite period, for the benefit of his wife, or of his wife and children, * * and to apportion the amount of the insurance money, as he may deem proper where the insurance is effected for the benefit of more than one."

By the second section, "The said insurance may be effected either in the name of the person whose life is insured, or in the name of his wife, or of any other person (with the assent of such other person), as trustee."

By section four, "When no apportionment is made in any policy or declaration as aforesaid, all parties interested in the said insurance shall be held to share equally in the same."

And by the fifth section it is enacted that, "Upon the death of the person whose life is insured, the insurance money due upon the policy shall be payable according to the terms of the policy or of the declaration as aforesaid, as the case may be, free from the claims of any creditor or creditors whomsoever."

And by 33 Vic., ch. 21, sec. 1, O., it is provided, "That in all cases when the party insured under any policy has directed, or shall hereafter direct, the insurance money, or any portion thereof, to be paid to his child or children, without naming any person to receive the same on his or their behalf during his or their minority, it shall be competent to the assurance company granting such policy, to pay the amount due to such of the children as shall be minors into the hands of the executor or executors of such insured person, * * who shall hold the same as trustees for such children, and the receipt of such executor or executors shall be a sufficient discharge to the Company."

And by the second section, "If the said insured shall have died or shall hereafter happen to die intestate * * the payment to a guardian of such infants, duly appointed

by one of the Surrogate Courts of this Province, shall be a sufficient discharge to the assurance company for the money so paid, and the Company shall not be bound to see to the application of the money, or be liable for the subsequent misapplication thereof; but the guardian so appointed shall give security to the Judge of such Court, for the faithful performance of his duty as guardian, and the proper application of the moneys which he shall receive."

The preamble to this Act recites that, by 29 Vic., first above quoted, it is provided that "upon the death of the party assured, the insurance money shall be payable according to the terms of the policy; and that, no provision being made in the said recited Act for the payment of such money in the event of the children entitled thereto being under age, Assurance Companies granting policies which have become subject to the provisions of the said Act, have experienced great difficulties and inconvenience in obtaining a proper discharge in cases where the assured has merely apportioned the same to his children, without naming any one to receive the same during their minority, and it is expedient to relieve them from such risk or inconvenience, and to provide some means whereby they may obtain a sufficient discharge, on payment of the said moneys; Therefore," &c.

I assume that the Companies could have protected themselves against any such risk or inconvenience, by having inserted in their policies proper provisions for the payment of moneys so going to minors; but having omitted to do so, the Act of 33 Victoria was passed, to afford some relief to Companies who had previously granted policies without any provision being made in respect of payment to minors.

It was contended by Mr. McKelcan that this plaintiff being no party to this policy, the personal representatives of the insured should have brought this action. We think not.

From the preamble to the last statute it is quite apparent that in the opinion of the Legislature the money secured

by the policy was payable to the wife and children, and not to the representatives of the insured, and so it provided that the Companies as respects minors might discharge themselves by payment to the executors, as trustees for the minor, or, where the party died intestate, to a guardian appointed by the Surrogate Court.

The Legislature was careful not to make it compulsory on such executor or guardian to receive such money, but only made it permissive for the Company so to pay the amount, and if so paid they would be discharged.

That, we think, was the only construction to be put upon the fourth and fifth sections of the 29 Vic. ch. 17, which expressly declares that the amount should be payable, not to the personal representatives of the insured, but according to the terms of the policy,—in the present case, to the plaintiff and the others named in the policy; and as no apportionment was specifically made, the four named shared equally.

The defendants were, therefore, under a legal obligation, from the terms of the policy, and by force of the statutes, to pay to the plaintiff his fourth share.

It seems to me clearly evident that the object and intent of the Legislature was, that the insurance money in such a policy should be paid directly to the wife and children, in their several rights, and not to the personal representatives of the insured, whose estate had no interest in the money secured by the policy, and which could not be administered as part of the assets.

The amending Act shews, as I have stated, that such was the construction put upon the first Act. If the executors of the insured could have sued for the amount, or have given a release, there was no necessity for the relief sought by the last statute.

The current tendency of Legislation is to give to the real parties interested the right of action, and to have before the Courts the litigants really interested in a suit, and to avoid the intervention of nominal plaintiffs.

We think the declaration states facts sufficient to shew

that the defendants were under a legal obligation to pay the one-fourth share of the insurance money to the plaintiff. It shews a policy granted by the defendants, under the provisions of the Act of the Legislature, and, as said by Bayley, J., in *Tilson et al v. The Warwick Gas Light Co.*, 4 B. & C. 967, "Where an Act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those persons to maintain an action of debt." See, also, *Carden v. General Cemetery Company*, 5 Bing. N. C. 252; *Vin. Abr. Debt (I.) 2*; *Com. Dig., Action on Statute*.

It was also pressed, that if this plaintiff was entitled to sue, it was only jointly with the others named in the policy; that the covenant was a joint one, to pay them jointly.

We think otherwise; for, independent of whatever effect the statute may have upon the terms of the policy, the covenant or promise on the part of the defendants was to pay to the plaintiff and the others named, if living, otherwise to the representatives and assignees of them, the plaintiff and the others, the \$1000 mentioned in the policy; and as no apportionment was made by the insured, by force of the statute the amount was payable to the parties named in equal shares; that is, one-fourth part to the plaintiff.

The interest of the plaintiff was a several one, and distinct and independent of the others.

The covenant in terms may be said to be joint; but, as said by Gibbs, C. J., in giving judgment in *James v. Emery et al.*, 8 Taunt. 245, in the Exchequer Chamber, "If the interest be several, the covenant will be several, although the terms of it be joint. In this case the interest is several, and the covenant must follow the interest of the covenantees."

Here the parties were all beneficially interested, and their interests were clearly several; therefore the covenant also is several, and the action for for the proportion of each may be brought severally. See also *Eccleston et ux. v. Clipsham*, 1 Wms. Saund. 153.

The case of *Lane v. Drinkwater*, 1 C. M. & R. 599, referred to by Mr. McKelcan, is an authority in favor of the plaintiff. There, Parke, B., said, at page 612, "The rule is clearly established, that, though a man covenants with two or more persons, using words which *primâ facie* import a joint covenant, yet, if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage."

Shaw v. Sherwood, Cro. Eliz. 729, was an action of debt on a bill obligatory, by the administrator of Robert Shaw. Oyer being demanded of the bill—which was in this manner, "This bill witnesseth that I, Robert Sherwood, have received of Thomas Pretty, £40, to the use of Robert Shaw and Jane Shaw," &c., "equally to be divided between them, which sum I confess to have received to the uses aforesaid, and the same to repay at such time as shall be thought best for the profit of the said Robert Shaw and Jane Shaw; which sum of £40 is the full bequest of their father"—there was a demurrer, and one question was, whether the repayment ought to be made of the £40 to Robert Shaw and Jane Shaw, or to Thomas Pretty who delivered it; and it was held that it should be to Robert Shaw and Jane Shaw," for although the word 'repay,' is properly to him who delivered it, yet, by the words 'to have received for the use and to be repayed when shall be thought best for their profit,' &c., shews the intent to be that it shall be paid unto themselves when they require it." A further question, whether this were a joint or several debt of £20 to each, and held that it was several to them in one deed, and that they should be divided debts, by reason of the words, "equally to be divided," &c.

Mr. McKelcan pressed the hardship and inconvenience of several actions being brought. It seems to me the inconvenience of a joint action is much greater than that of several actions.

The interests of the beneficiaries may be assigned, and the death of some one or more of them may create infinite difficulties in effecting a final settlement, and different defences may be set up by the defendants.

On the whole, we are of opinion that our judgment should be for the plaintiff on demurrer.

Judgment for plaintiff.

BEARD ET AL. V. STEELE.

Commission to take evidence—Execution abroad—34 Vic. ch. 14, O.—Carriage by water—Bill of lading—Liability for storage and non-delivery at place specified—33 Vic. ch. 19, O.

Held, under 34 Vic. ch. 14, O., that the due taking of a commission, executed in Montreal, was sufficiently proved by an affidavit made before a notary public there, and not before the Mayor or Chief Magistrate as required by Consol. Stat. U. C. ch. 32, sec. 21.

The plaintiffs having purchased 100 tons of iron from B. L. & Co., in Montreal, it was delivered by B. L. & Co. to McC., the defendants' shipping agent, to be carried on a vessel of defendant, (Western Express Line) to Toronto, and a bill of lading was signed by a clerk of McC. which contained the stipulation, "to be landed at Beard's wharf." This delivery was also shewn in evidence apart from this document. The iron was actually shipped on the 8th of Oct., 1872, on the Dromedary, one of the said line, and the freight paid to McC. The iron, less half a ton, arrived at Toronto between 9 and 10 at night, and was delivered at Toronto, at Milloy's wharf, some distance from the plaintiffs' wharf, on the 10th of October, and was taken away by plaintiffs. The defendant, who was on the vessel, said he sent first to the plaintiffs' wharf, who had no notice of its coming, but found no person there, and no light, and therefore delivered it as stated. He denied any right in McC. to make a special bargain for freight or delivery and in McC.'s clerk to sign any bill of lading.

Held, that defendant having accepted the freight paid by reason of the bargain, with McC., could not deny McC.'s authority to make it.

Held, also, too late to object that the document was signed by McC.'s clerk, and not the master or purser, the master having accepted the cargo represented by it.

Held, also, that the consignees might properly sue in assumpsit for non-delivery of the goods, under the circumstances of this case, independently of the 33 Vic. ch. 19, O.

Held, also, that 33 Vic. ch. 19, O., was not beyond the powers of the Provincial Legislature, as being an interference with "Trade and Commerce," (B. N. A. Act, sec. 91, sub-sec. 2); and under this enactment the plaintiffs' right to sue was clear.

Held, also, that as the contract was to be performed in Ontario it was governed by the law of Ontario.

Held, also, that the plaintiffs were entitled to delivery at their own wharf, and that defendant's excuse for not delivering there was insufficient.

Held, also, that defendant was liable for the shortage in weight, though all put on the vessel was delivered, for it was shewn that the full quantity was delivered to McC., and it was not shewn that it had all been put on board the vessel.

The plaintiffs, therefore, were held entitled to recover for the shortage, and for the expense of carriage from Milloy's wharf to their own.

THIS was a County Court cause, tried at Toronto at the last Spring Assizes, before Galt, J., without a jury.

Declaration—First count: That in consideration that the plaintiffs would deliver to defendant, as and being a carrier of goods for hire, certain goods to be by the defendant carried from Montreal to Toronto, and there to be delivered and landed at the plaintiffs' wharf, for reward to the defendant, he, the defendant, promised the plaintiffs to carry, deliver, and land the same as aforesaid, certain perils and casualties only excepted. Averment of delivery of goods by plaintiffs to defendant, and receipt of same by him for the purpose aforesaid, and of breach by defendant in that he did not deliver and land the goods at the said wharf, but delivered and landed the same at a wharf a long distance from the plaintiffs' wharf, and the plaintiffs had to pay wharfage dues on the goods, and to convey the same to their own wharf, whereby they sustained damage.

Second count: alleging a delivery of only part of the goods at Toronto for the plaintiffs, and a non-delivery of the residue for them.

Third count, for money paid.

Pleas: 1. That defendant did not promise, as to the first and second counts.

2. Never indebted, to the third count.

3. To the first count, that defendant did carry the goods from Montreal to Toronto, and there deliver and land the same at the plaintiffs' wharf.

4. To the first count, that defendant did carry the goods from Montreal to Toronto, and although he was ready and willing to land the same at the plaintiffs' wharf,

yet the plaintiffs were not ready and willing to receive the same there, whereby the defendant was prevented from landing the same at said wharf, and therefore landed the same at another wharf at Toronto for the plaintiffs.

5. To the second count, that defendant did safely carry the said goods from Montreal to Toronto, and there delivered the same for the plaintiffs.

6. To the third count, payment.

Issue.

The *vivâ voce* evidence given for the plaintiffs was to the following effect :—That the Dromedary steamship left 100 tons of pig iron at Milloy's wharf here on the 12th of October, 1872, for the plaintiffs. The plaintiffs took the iron away from Milloy's. Their own wharf is about half a mile distant from Milloy's. There was a shortage of 1142 lbs. The plaintiffs received the bill of lading annexed to the commission from Buchanan, Leckie & Co. There was another bill of lading, which did not say the iron was to be landed at the plaintiffs' wharf.

The *vivâ voce* evidence for the defendant was as follows : The defendant said, "In September, 1872, I was owner of the Dromedary. I knew McCuaig. He is a freight agent in Montreal, he was agent for my vessel. My boat formed one of "The Western Express Line." I know McFall, he was a clerk of McCuaig. McCuaig had authority to give bills of lading."

In cross-examination, he said : We had a regular tariff. The iron in question was not carried on the ordinary tariff. I was in Montreal when the iron was offered. Neither McCuaig, nor his man, had authority to sign such a bill of lading. I never gave McFall authority to sign bills of lading. I came up with the boat. I believe all the iron received was delivered. The vessel arrived on Friday night, between nine and ten. I sent the captain and purser to plaintiffs' wharf. They found no person there. This was the reason the iron was not landed.

Re-examined,—We came to Milloy's wharf and sent two men to Beard's wharf. The vessel left Montreal about the

8th of October. The bill of lading was dated the 10th September. It was on the 7th October McCuaig came to me about the iron. I believe McCuaig got the freight. The iron was not put on board for nearly a month after the bill of lading was given.

Re-cross-examined—McCuaig had no authority to make any special bargain. This was a special bargain.

Re-examined, second time,—The freight was 50 cents higher, (at time of shipping), than it had been up to that time. It was on the 7th October that McCuaig asked me to take the iron.

Thomas W. Leggo, the purser of the boat, said: "I remember the arrival of the vessel. I landed all I received of the 100 tons. I took none away. We delivered it at Milloy's wharf. The captain and I went to Beard's wharf, and we did not see where we could land it. There were coal and wood on the wharf."

In cross-examination, he said,—“It was half-past ten P.M. It was a dark night. We did not go to the end of the wharf.”

A material fact was established by the evidence taken under the commission, if it were properly receivable, which was, that McCuaig, the defendant's shipping agent, actually got the full quantity of 100 tons.

The evidence of that fact was as follows: *George Mathieson*, who was a salesman of Buchanan, Leckie & Co. at the time of the plaintiffs' purchase of iron from them, said—"I made the arrangement for freight with McCuaig. He had the privilege of sending a tally man to see the quantity was correct. He asked who would weigh it. I said, 'John Crowe.' He said, if he could find time to send his tally man he would send him; if not, he would take John Crowe's weight."

John Crowe, then said, he weighed the iron to be shipped to plaintiffs. "There were 100 tons of 2240 lbs. each. I delivered the iron to the carter William Emo. He received the 100 tons so weighed by me."

William Emo said—"John Crowe delivered to me the

iron. A bill was given me for 100 tons. I was told it was for Beard Brothers & Company. I believe it was carted. I did deliver all the iron I received. I cannot, of course, say how much there was. I believe I delivered it on the wharf to Mr. McCuaig. I was paid for carting 100 tons."

The defendant's counsel objected at the trial, that the commission could not be used, because the affidavit of the due taking of it was sworn before a Notary Public in Montreal. The learned Judge over-ruled the objection, and the commission was used.

The defendant's counsel further objected, that the plaintiff could not maintain the action on the document called a bill of lading, because it was not a bill of lading; because it was not an agreement with any body; because McFall had no authority to bind the defendant; and because, if it were an agreement, it was an agreement with other parties than the plaintiffs.

The bill of lading was as follows: "Shipped in good order and condition, by Buchanan, Leckie & Co., Montreal, and consigned to Messrs. Beard Bros. & Co., Toronto, in and upon the steamboat Western Express Line, whereof McFall is master, for the present voyage, and now lying in the port of Montreal, viz.: one hundred tons, No. 1, Eglinton Pig Iron, ea. 2240 lbs., being marked and numbered as per margin, and are to be delivered in like good order and condition at the Port of Toronto, to be landed at Beard's wharf there, the act of God, &c., excepted. He or they paying freight for said goods, \$2.50 per 2240 lbs. ton. In witness whereof the master or purser of said steamboat hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the rest to stand void. Dated at Montreal this 10th day of September, 1872."

On the margin were the words, "Loose 100 tons No. 1 Eglinton," "For Master & McFall."

The learned Judge noted as follows: "I am of opinion the plaintiffs cannot recover for the reasons set forth in Mr. Harrison's objections, but I reserve leave to plaintiffs

to move to enter a verdict in their favour for \$97.84, or such other sum as the Court may think they are entitled to." A nonsuit was therefore entered.

In Easter Term last, *Lash* obtained a rule *nisi* to set aside the nonsuit and for a new trial.

In this Term, *Harrison*, Q. C., shewed cause.

The affidavit of the taking of the commission, having been sworn before a Notary Public, was invalid, and the whole of the evidence taken under the commission and read at the trial should have been excluded : Consol. Stat. U. C. ch. 32, sec. 21 ; 26 Vic. ch. 41, sec. 3 ; 34 Vic. ch. 14, sec. 4, O. *Frank v. Carson*, 15 C. P. 135 ; *Graham v. Stewart*, 15 C. P. 169 ; *Muckle v. Ludlow*, 16 C. P. 420.

34 Vic. ch. 14, sec. 4, may be relied on by the plaintiffs, but that makes affidavits sworn before the persons therein named as valid as if sworn in this Province before a commissioner for taking affidavits here, and a commissioner would not have authority to take such an affidavit. The Consol. Stat. U. C. ch. 32, sec. 21, is a special statute, and provides for the particular act of executing commissions for taking evidence in foreign countries, and the authority by and before whom such an affidavit as the present is therein required to be made ; it should be made therefore before that person, and not before a general authority provided for by a general statute : *Pretty v. Solly*, 26 Beav. 606 ; *De Winton v. The Mayor, &c., of Brecon*, 26 Beav. 533 ; *Attorney General v. Great Eastern Railway Co.*, L. R. 7 Ch. App. 475.

If that objection do not prevail, then is the document in question a bill of lading ? It is in the form of one, but it is not signed by the master, mate or purser, but by a servant or employee of Mr. McCuaig, who was the agent of the Western Express Line, which is insufficient : *Cellier v. Hinde*, 17 L. T. N. S. 341 ; *The Royal Canadian Bank v. Carruthers et al.*, 28 U. C. R. 578. In *Lickbarrow et al. v. Mason et al.*, 2 T. R. 63, 75, it is explained what a bill of lading is. It is an acknowledgment by the captain of his

having received the goods on board his ship. Here, too, the document was signed long before the goods were shipped, and that, as is said in the last mentioned case, was 'a fraud.'

If this instrument be a bill of lading, it did not constitute an agreement between the owner of the ship and the consignees, and so the plaintiffs cannot maintain their action for not delivering the iron at their wharf according to the contract. The consignee, or his assignee, may sue on the bill of lading in respect of his right of property in the goods which each of them has, but not upon any contract relating to the goods: *King et al. v. Meredith*, 2 Camp. 639; *Dawes v. Peck*, 8 T. R. 330; *Freeman v. Birch*, 3 Q. B. 492, note; *Thompson et al. v. Dominy et al.*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 297. The law was altered in that respect in England by the 18 & 19 Vic. ch. 111. A similar Act was passed by our Local Legislature, the 33 Vic. ch. 19, O., but it may be a question whether it was not an interference with trade and navigation, which are matters only to be dealt with by the Dominion Parliament. B. N. A. Act, sec. 91, sub-sec. 2. If the Act is free from that objection, still it does not apply here, because the contract, if any, was made in Quebec and not in Ontario. He cited also *Smurthwaite v. Wilkins et al.*, 11 C. B. N. S. 842; *Meyer v. Dresser*, 16 C. B. N. S. 646; *Short v. Simpson et al.*, L. R. 1 C. P. 248; *Allen et al. v. Chisholm*, 33 U. C. R. 237.

As to the shortage, the bill of lading does not make the defendant liable. The quantity mentioned in it does not by the statute bind the owner, but the Master only. See some of the last mentioned cases, and also *Grant et al. v. Norway et al.*, 10 C. B. 665; *Hubbersty et al. v. Ward*, 8 Ex. 330; *Jessel v. Bath et al.*, L. R. 2 Ex. 267. The defendant is shewn to have delivered all the iron he got. Contracts made by agents may be adopted by the persons they acted for, but that rule does not apply to a foreign contract, like the present one: *Bradlaugh v. De Rin*, L. R. 3 C. P. 538, S. C. in Ex. Ch. L. R. 5 C. P. 473. He also cited *Berkley v. Watling et al.*, 7 A. & E. 29.

Lash, supported the rule. Consol. Stat. U. C. ch. 32, sec. 21, is directed to the mode of proof, viz., by affidavit. How that affidavit is to be taken is but secondary, in view of the statute. The affidavit of the taking of the commission was sworn before a competent person. It was the same as if it had been sworn in open Court: 34 Vic. ch. 14, sec. 4, O.; Consol. Stat. U. C. ch. 39, secs. 1, 2. The Courts will not construe the Act strictly: *McLeod v. Torrance*, 3 U. C. R. 146; *Passmore v. Harris*, 4 U. C. R. 344; *Doe Park et al. v. Henderson*, 7 U. C. R. 182, 188; *Comstock v. Burrowes*, 13 U. C. R. 439. Although this bill of lading may be a foreign document, it is an instrument well known and in common use here; and it is for the party who sets up a different rule of law, as applicable to such an instrument, than is applicable to such an instrument in this Province, to shew that the law of the other country is different from our own: *Smith v. Gould et al.*, 4 Moore's P. C. 21. But the question is not open under the pleadings here: *Hope v. Caldwell*, 21 C. P. 241; *Robertson v. Caldwell*, 31 U. C. R. 402; *Benham v. The Earl of Mornington*, 3 C. B. 133; and the contract having been performed, must be construed by our law: *Story's Conflict of Laws*, 7th ed., sec. 280. The sale of unascertained goods may pass the property in them: *Benjamin on Sales*, 2nd ed. 248. The iron here was fully delivered to the plaintiffs, so that the property passed to them. It was selected by the vendors and sent by them to the ship's wharf, and was shipped by them for the plaintiffs, and consigned to them. The delivery of the iron by the vendors on the ship's wharf for the plaintiffs, was a delivery to the ship for the plaintiffs: *British Columbia, &c., Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499; *Fragano v. Long*, 4 B. & C. 219, 222. As the law formerly was, the consignee could maintain assumpsit against the owner of the ship for non-delivery of the goods, because he had the property in them: *Anderson v. Clark*, 2 Bing. 20; *Tronson v. Dent et al.*, 8 Moore's P. C. 419. The vendors were the agents of the plaintiffs in making the contract with the owner of the ship. There was a privity thus created between the

plaintiffs and defendant: *Broom's Com. L.*, 4th ed., 317. The consignee is the only person to sue the carrier if the property has passed: *Evans v. Marlett*, 1 Lord Raym. 271; *Dawes v. Peck*, 8 T. R. 330, 332. The consignor can only sue the carrier in special cases, such as on the consignor paying freight and the like. But it was said, that McFall had no power to sign the bill of lading for the master. McFall was a clerk in McCuaig's employ, and the general superintendent of his shipping business, and McCuaig was the freight agent of the defendant for the ship. It was rather admitted that McCuaig himself could have signed the bill for the owner, and perhaps for the master. There is no reason why McFall could not do so too. The defendant adopted this bill of lading. He was on board the ship on the voyage on which she carried the iron. He knew the goods were to be taken to the plaintiffs' wharf, for he took the goods there, and the only reasons he gives for not leaving them there were, that there was no light on the wharf at the time, and no person there to receive them. Independently of the bill of lading, the plaintiffs, as owners of the goods, have the right to look to the defendant as carrier for their goods.

WILSON, J., delivered the judgment of the Court.

The taking of the examination required by the Consol. Stat. U. C. ch. 32, sec. 21, must be proved by affidavit, sworn before and certified by the Mayor or Chief Magistrate of the city or place where the same was taken. That has not been done.

The 26 Vic. ch. 41, does not apply, and so far as this Province is concerned it has been repealed by the Ontario Act, 34 Vic. ch. 14.

This last Act authorizes affidavits, &c., made out of Ontario to be made "before any Notary Public, certified under his hand and official seal," &c., and it declares the same shall be of like force and effect to all intents and purposes, "as if such affidavit had been made, &c., in the Province, before a commissioner for taking affidavits therein, or other competent authority of the like nature."

A commissioner could not have taken this affidavit.

What was meant was, to make the foreign affidavit, &c., so made as available here as if the business had been done, here and had been made before a commissioner or other competent authority.

The statute should have been expressed as follows: "The affidavit, &c., shall be as valid and effectual, and shall be of like force and effect to all intents and purposes, *as if the matter or business to which such affidavit, &c., relates had been done and carried on in this Province*, and as if such affidavit, &c., had been made, &c., in this Province before a commissioner, &c."

And I think it is not carrying the statute too far to give it this interpretation, as if the words suggested had been contained in it: *Smurthwaite v. Wilkins et al.*, 11 C. B. N. S. 842, 848.

We think it was intimated in *Frank v. Carson*, 15 C. P. 135, 151, that a commission executed abroad might be brought into Court by the commissioner, and that he might be sworn *vivâ voce* as to its due execution. If so, then this affidavit may be sustained by the statute as it now stands, for the affidavit made abroad is to be as valid as if it had been sworn here before *any competent authority*, and it could be so sworn here before such an "authority."

The case of *Heyland v. Scott*, 19 C. P. 165, may be referred to on this subject.

If the objection had prevailed, it could not have made much difference, for the whole of the plaintiffs' case could be and was established by the *vivâ voce* evidence given at the trial and the bill of lading, excepting the one matter, that the full weight of the 100 tons was actually delivered at the wharf to the defendant's agent, and that affects the shortage only.

As to the merits, the plaintiffs bought the iron from Buchanan, Leckie & Co., and they got a delivery of it in Montreal.

It was delivered to the defendant's ship, for the plaintiffs at Toronto. The vendors sent a document to the plaintiffs

as consignees of the iron. The property in the iron passed, by reason of the transaction between the vendors and the plaintiffs, to the plaintiffs as purchasers. The iron which was shipped was the property of the plaintiffs. The vendors and shippers of it acted as the agents of the plaintiffs in forwarding it.

The facts shew that the delivery, apart from the document in question, was to have been at the plaintiffs' wharf. The defendant says McCuaig had no power to make such a bargain for him. But the defendant has taken the freight paid by reason of it, and has kept it, and he cannot both keep the money and deny the bargain.

On these facts, without reference to the disputed documents, the case is altogether against the defendant : *Fragano v. Long*, 4 B. & C. 219, 222.

Then as to the document which is called a bill of lading. It is said it is not one, because it was not signed by the master, but by McFall for him. It is now too late to raise that question, after the master has accepted of the cargo represented by it. That is sufficient for the purposes of this suit.

But it is said, the consignee of the bill of lading cannot sue upon it in assumpsit, for non-delivery of the goods; that by the former law the property only passed by the bill of lading, but not the contract in respect of the goods which were the subject of it.

That certainly was the rule before the late statute as to assignees of the bill of lading; and of the many cases that might be selected, *Thompson et al. v. Dominy et al.*, 14 M. & W. 403, and *Howard v. Shepherd*, 9 C. B. 297, may be referred to as to the proceedings by assignees.

But the cases of *Evans v. Marlett*, 1 Lord Raym. 271; *Sargent v. Morris*, 3 B. & A. 277; *Berkley v. Watling et al.*, 7 A. & E. 29, 39; *Anderson v. Clark*, 2 Bing. 20; *Dawes v. Peck*, 8 T. R. 330, shew that the consignee is the proper person to sue in such a case as this, in respect of his ownership, on the special contract which was made respecting his property. Three of these cases were in assumpsit by the consignee.

In fact the contract was made by the consignors as agents for the consignees, the owners of the iron, and *Fragano v. Long*, 4 B. & C. 219, which was also assumpsit, is very applicable.

The case of *Higgins et al. v. Senior*, 8 M. & W. 834, might also, if necessary, be relied upon.

So far we have considered the case without reference to the Ontario Act, 33 Vic. ch. 19, enacting the Imperial statute with respect to bills of lading, because it was said the Act of our Legislature was unconstitutional, as being an invasion on the jurisdiction of the Dominion Parliament, which alone has the power to regulate trade and commerce. We think we may safely accept this statute as passed with due authority, declaring the rights and liabilities of parties under these ordinary instruments of traffic, without infringing on the powers and authority of the Dominion Parliament.

And the plaintiffs' rights under that statute are admittedly free from all doubt and question.

The place of performance of this contract was Ontario, and therefore the contract is to be governed by our law: *Story's Conflict of Laws*, 7th ed., sec. 280; *Meyer v. Dresser*, 16 C. B. N. S. 646, per *Byles, J.*, p. 665.

The defendant is liable for the non-delivery at the proper place on the plaintiffs' own wharf. What excuse had he for not delivering the goods, because the plaintiffs were not on their wharf at ten o'clock at night, and because there was no light on it?

That was not a reasonable time to require the plaintiffs to be there, when they had no notice of the coming of the ship. The defendant should at least have sent for the plaintiffs at the place where they would have been likely to have been found at that time of night. But even then, they could not have been required to attend to receive 100 tons of pig iron at such an hour.

If the exigencies of the vessel required such extraordinary despatch for the owner's interests, it is only reasonable it should be gained at his own expense, and not at the

expense and inconvenience of others. See *Howard v. Shepherd*, 9 C. B. 297, 320, 321; *Tronson et al. v. Dent et al.*, 8 Moore's P. C. 419; *Startup et al. v. Macdonald*, 6 M. & G. 593.

As to the shortage. The evidence shews the full quantity was delivered at the shipping wharf to the defendant's agent. It is shewn that all the iron put on board was delivered here; but it was not shewn that all the iron delivered to the defendant's agent was put on board by the agent at Montreal.

The plaintiffs are entitled to a verdict for the amount stated at the trial.

The rule will be absolute to set aside the nonsuit, and to enter the verdict for the plaintiffs with damages for the sum of \$97.84.

Rule absolute.

McROSSIE V. PROVINCIAL INSURANCE CO.

Insurance—Magistrate's certificate of loss—"Concerned in the loss."

A fire policy on a saw mill and machinery therein required, in the event of loss, a certificate containing certain information "under the hand of a Magistrate or Notary Public most contiguous to the place of the fire, *and not concerned in the loss as a creditor or otherwise,*" &c.

The magistrate who certified had leased the land on which the mill stood to the plaintiff for fifteen years, of which nine were unexpired. The mill insured by defendants had been built by the plaintiff to replace one previously burned, and no rent was due at the time of the fire. There were no covenants on the part of the lessor to keep in repair, and there was a covenant on plaintiff's part to leave the mill in sufficient repair at the end of the term to saw 2000 feet in twelve hours; any machinery not required for this purpose to be removed by the plaintiff or paid for by the lessor.

On a motion to set aside a verdict entered for the plaintiff in an action on the policy:

Morrison, J., was of opinion that the magistrate was not concerned in the loss, within the meaning of the condition. *Wilson, J.*, that he was. The Court being equally divided the rule dropped.

THIS was an action on a fire policy, tried at Kingston, before Gwynne, J., at the Fall Assizes, 1872, when a verdict was rendered for the plaintiff, and \$2500 damages.

There were six pleas on the record ; but the only plea on which any point arose was the third plea, which, set out a condition endorsed on the policy, providing that all persons insured by the defendants, and sustaining loss or damage by fire, should procure "a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the assured or sufferers,) that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows or verily believes that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned, and that until such certificate should be produced the loss should not be deemed payable."

And the defendants alleged, that the plaintiff did not furnish them with any such certificate.

On this plea issue was joined.

Upon the trial a certificate was given in evidence containing all the information required by the condition set out in the plea, signed by one Martin Shehan, a magistrate nearest the place of the fire, and which was duly delivered to the company.

It appeared also, that the premises upon which the insured property, a saw mill and machinery, was erected were leased by Mr. Shehan to the plaintiff for a term of 15 years from the 1st of January, 1866, at a rental of \$200, payable quarterly. The only covenants in the lease on the part of the plaintiff were, that he would pay the rent, and that he would leave the premises in such good and sufficient repair as to be capable of sawing 2000 feet of lumber in 12 hours, the lessor agreeing to allow any extra machinery that might be erected on the premises by the plaintiff more than requisite to saw 2000 feet to be removed at the expiration of the plaintiff's possession, or that the lessor should pay a fair compensation for the same.

It also appeared that the mill was erected by the plaintiff, that he had of his own property in it machinery to

the value of \$2,200, and that at the time of the fire and the giving of the certificate no rent was due to Shehan.

It was objected that the plaintiff could not succeed, as the certificate was signed by a magistrate concerned in the loss, being the landlord of the premises in question.

The learned Judge overruled the objection, and in his charge he told the jury that there was evidence of a certificate having been given, containing the requisite information, and that he could not say that as being landlord he was necessarily concerned in the loss, within the terms of the condition. The charge was objected to.

During Michaelmas Term last *Duggan*, Q. C., obtained a rule *nisi* for a new trial for misdirection, on the ground that the certificate required by the 10th condition was not in accordance with the certificate required, not having been given by a magistrate not concerned in the loss, the magistrate being concerned in the loss as the owner of the premises and the lessor of the plaintiff.

In Easter term *George Kirkpatrick* shewed cause. The facts shew the magistrate was not interested. The mere fact that he was landlord does not controvert that statement. The lease had nine years to run, and the lessee covenanted to leave in repair at the end of the term. No rent was due at the time of the fire. He referred to *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74, 90; *Regina v. Manchester, Sheffield and Lincolnshire R. W. Co.*, L. R. 2 Q. B. 336; *Regina v. Dean, &c., of Rochester*, 17 Q. B. 1.

J. H. Cameron, Q. C., supported the rule, and cited *Kerr v. British America Assurance Co.*, 32 U. C. R. 569; *Platt v. Gore District Mutual Fire Insurance Co.*, 9 C. P. 405.

MORRISON, J.—The only question for our consideration arises on the stipulation in the tenth condition endorsed on the policy, viz., that the plaintiff shall procure a certificate under the hand of a magistrate, or a notary public, most contiguous to the place of the fire, and not concerned in

the loss, as a creditor or otherwise, or related to the insured or sufferers, that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent enquiry into the facts set forth in their statement, and knows, &c., that he, &c., really, &c., by misfortune, &c., sustained by such fire, loss and damage to the amount therein mentioned.

It was contended, on the part of the defendants, that the certificate produced at the trial signed by Martin Shehan, was not a certificate in pursuance of that condition, Shehan being a person concerned in the loss.

It appeared by the policy that the insurance was \$750 on a saw-mill, stated in the policy to be owned and occupied by the plaintiff, and \$500 on the belts, saws, pulleys, and other machinery therein.

The premises upon which the saw-mill was erected were leased by Shehan, (who signed the certificate) to the plaintiff for 15 years, from the 1st January, 1866, and at the time of the fire the lease had nine years to run. The mill in question had actually been erected by the plaintiff, the previous mill on the premises having been destroyed by fire. The lease contained a covenant that the plaintiff would leave the premises in as good and sufficient repair, as to be capable of sawing 2000 feet of sawn lumber in 12 hours; the lessor agreeing to allow the plaintiff to remove any extra machinery that might be erected by the plaintiff more than required to saw 2000 feet in 12 hours, at the expiration of the plaintiff's possession, or otherwise the lessor covenanted to pay the plaintiff a fair compensation for the same.

This formal condition in the policy, requiring the production of the certificate in question, is one imposed by the defendants, and for the performance of which the assured has no compulsory power, no matter how strongly or properly the circumstances may entitle him to it, or enable the magistrate to give the required certificate, and it is a stipulation, when complied with, I have no doubt has little or no effect upon the minds of the officers

of the company in their dealings with the adjustment of the loss.

It is, however, quite competent for the defendants to include such a stipulation among their other numerous conditions, and the Court is bound to give effect to it; yet this is not a case which we would critically examine for the purpose of giving effect to such an objection, and would not do so unless it was clearly shewn that the magistrate was excluded by the condition, and if a company uses indefinite or obscure language in a condition, it should be construed in the way most favorable to the insured.

No case was cited to us, nor can we find any authority bearing directly on the point; no doubt, arising from the circumstance that the companies in England many years ago disused similar stipulations in their policies, and we must look to decisions of a somewhat analogous character to guide us.

The expression "concerned in the loss" is a loose one and cannot be very accurately defined, and the words following "as a creditor or otherwise" throw little light upon what the defendants intended by their use. The word "creditor" we can understand; but whether it is intended to signify a creditor directly interested in the loss, so that he would be entitled of right to claim a share of the proceeds from the assured, or one remotely interested as an ordinary unsecured creditor, it is difficult to say. I am rather inclined to adopt the former definition, considering that the words "creditor or otherwise" are preceded by the words "concerned in the loss," as I think it would be absurd to suppose that the defendants meant an ordinary creditor of the assured, say to the amount of \$1, which might be the effect of the condition if it required a certificate from a magistrate not a creditor (*simpliciter*) of the assured; but the words "as a creditor or otherwise" following "concerned in the loss" indicates, as I think, that the word "concerned" means interested, *i. e.*, interested in the loss.

If the word "interested" had been used, it would I think be construed to mean directly interested, in the loss, not remotely.

And so, in my judgment, using the word "concerned" as here, means the same thing.

What was said in the case of *Regina v. The Manchester, Sheffield and Lincolnshire R. W. Co.*, L. R. 2 Q. B. 336, has some bearing on this case. There the application was to quash an inquisition, taken before the Sheriff of Lancaster, on the ground that the Sheriff was interested in the matter in dispute, and within the 39th sec. of the Land Clauses Consolidation Act of 1845, which provided that in questions of disputed compensation the jury should be summoned by the sheriff of the county, and if such sheriff be interested in the matter in dispute, the warrant to summon the jury should be issued by some coroner of the county. There the sheriff issued the warrant, and it appeared that the day before he issued the warrant an Act had received the Royal assent enabling two other companies to acquire an interest in the Manchester, Sheffield, and Lincolnshire R. W. Co., in one of which two companies the sheriff was possessed of some shares. By the Act it was provided, that within six months after the passage of the Act the two companies should pay to the Manchester, Sheffield, and Lincolnshire R. W. Co., a sum equal to two-thirds of the expenditure, and by section 7 of the Act, it was declared "that from and after the date of the said payment, the two companies shall * * be deemed joint owners with the Sheffield Company of the undertaking in equal shares," and so it was contended that the sheriff was interested in the matter in dispute.

Mellor, J., in giving the judgment of the Court, after stating that it was a maxim of law well established that a direct pecuniary interest in the matter in dispute disqualified any person from acting as a judge in such matter, and that formerly witnesses were disqualified where they had a direct and certain interest, said, "The interest, however, which disqualifies at common law must be direct and certain, and not remote or contingent. We think that the words 'interested in the matter in dispute' in the 39th section, are intended to convey the same meaning; that under the circumstances of this case the sheriff,

at the time the warrant was issued and the jury summoned and the inquiry held, had no certain or direct interest in the subject matter in dispute which disqualified him from acting by his under sheriff in summoning the jury and taking the inquisition. * * Had the six months elapsed from the passing of the Act of 1866, and the money been paid by the Midland Company," (in which the sheriff had stock,) "the result would have been different, inasmuch as the Midland Company having thereupon become a joint owner in the undertaking, the sheriff would have had a direct and certain interest in the matter in dispute. At the time the warrant was issued and the inquisition held his interest in the matter in dispute was neither direct nor certain, but simply contingent and remote, depending upon the actual completion of the parliamentary arrangement made between the three companies. It was however said that at all events the Manchester, Sheffield, and Lincolnshire Company would have had a right of action against the Midland and Great Northern Companies, had the non-completion of the arrangement arisen from their default, and that the amount of the damages to be recovered might be increased by reason of these proceedings. It is difficult to see that such a result would constitute a direct and certain interest in the Sheriff. It rather appears to us to be an interest at once contingent and remote, and therefore not within the section. * * In the view which we take of the provisions of the Act the sheriff was not disqualified, and the present is certainly not a case in which we should be astute to give effect to an objection purely technical, and without a particle of merits to support it."

So, in this case, I do not think that the magistrate, at the time he signed the certificate, was concerned or interested in the loss, within the meaning of the condition. He certainly was not a creditor, and how otherwise was he pecuniarily interested. The lease under which the plaintiff held the property had nine years to run. It contained no covenant on his part to repair during the term, or that he should insure the pre-

mises, or if the premises were insured that the insurance moneys should be laid out in replacing the mill and machinery, or that the lessor should be entitled to any portion of them; all that the lessor stipulated for being that at the end of the term the plaintiff should leave the premises in such repair as already stated.

On the whole, I am of opinion that when the magistrate signed the certificate he was not concerned in the loss, within the meaning of the condition; in other words, he had no direct or certain pecuniary interest in the loss. If it could be said that he was concerned in it, his interest was too remote, and contingent upon the breach of a covenant by the plaintiff, nine years hence, a covenant which might never be broken.

I think the rule should be discharged.

WILSON, J.—I have read the opinion of my brother Morrison, but I have not been able to agree with it.

I refer to the following authorities on the subject: *Lord Mostyn v. Spencer*, 6 Beav. 135; *Esdaile et al v. Lund*, 12 M. & W. 734; *Regina v. The Inhabitants of Upton St. Leonard's*, 10 Q. B. 827; *Regina v. Justices of Hertfordshire*, 6 Q. B. 753; *Dimes v. The Grand Junction Canal Co.*, 17 Jur. 73, 3 H. L. Cas. 759; *Barclay v. Cousins*, 2 East 544; *Lucena v. Crauford et al*, 3 B. & P. 75, 2 B. & P. N. R. 269, 321; *Seagrave v. The Union Marine Ins. Co.*, L. R. 1 C. P. 305, 320; *Wilson v. Jones*, L. R. 2 Ex. 139, 150; *Regina v. Rand et al.*, L. R. 1 Q. B. 230; *Regina v. Dean of Rochester*, 1 Q. B. 1; *Regina v. The Manchester, Sheffield, &c., R. W. Co.*, L. R. 2 Q. B. 336; *Regina v. Allan et al.*, 4 B. & S. 915, 922; *Re Hopkins*, E. B. & E. 100.

In my opinion the objection which was taken to the certificate having been granted by the landlord of the insured was given by a person who was interested in the loss and is a valid objection. The landlord could have insured his interest in the premises as well as the tenant, and if the premises had been destroyed by fire, and both of them had

been magistrates, it would be strange if, with such a condition as this in the policy, they could have certified the one in favor of the other.

I think they could not have done so, and for the same reason, and governed by the like principle, the landlord was not a competent or qualified person to grant it to the tenant on this occasion.

The rule must therefore drop, and I cannot say I regret it, for the objection is one of a formal character, and the verdict is right on the merits.

The rule therefore dropped.

HELEY ET AL. V. COUSINS ET AL.

*Replevin bond—Assignment of—*11 Geo. II. ch. 19, sec. 23—4 Wm. IV. ch. 7, sec. 2, C. S. U. C. ch. 29, sec. 8.

Held, that an assignment by the sheriff of a replevin bond is valid in Ontario, attested by only one witness.

Semble, That a subscribing witness is necessary to its validity.

Held, also, that a plaintiff suing on such bond is entitled to a verdict for the penalty, but the Court will not allow him to recover more than the actual damages if assessed.

APPEAL from the County Court of Carleton.

The declaration was by the assignees of the sheriff on a replevin bond.

The plaintiffs averred, that the sheriff duly assigned the bond to the plaintiffs, according to the form of the statute in such case made and provided.

And the defendants, among other pleas, pleaded that the bond was not assigned to the plaintiffs as alleged; on which issue was joined.

The learned Judge, as will be seen by his judgment, decided that as there were not two witnesses to the execution of the assignment by the sheriff, and as it was imperatively necessary there should be two witnesses to it, the plaintiffs had failed to sustain the issue; and that the nonsuit entered at the trial should stand.

He was also of opinion that the plaintiffs, if entitled to have a verdict entered for them on the leave reserved, were not entitled to recover the penalty of the bond, but damages assessed upon the bond to the amount of rent in arrear and the costs of the replevin suit.

The plaintiffs appealed from his judgment on both these points. The other facts necessary to the report appear fully in the following judgment of the learned Judge in the Court below :

ARMSTRONG, Co. J.—“The chief point to be determined is, as to the execution of the assignment by the sheriff to the plaintiffs.

The first statute in this country expressly giving the action of replevin is 4 Wm. IV. ch. 7.

The first clause enacts, that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may obtain a writ according to the form prescribed.

The second clause declares, that before the Sheriff proceeds to replevy, he shall take pledges from the plaintiff, that is, the person complaining of wrongful distress, “according to the law of England in that behalf,” and the bond may be in a form given in schedule B. to the Act, “and the assignment thereof to be made to the defendant may be according to the form given in the same schedule.”

The 8th section gives the Court of King's Bench power to make rules of practice and forms for the action.

The 9th section, however, provides, “That in the absence of any provision in this Act, or in any rule of the King's Bench to the contrary, the practice in England in cases of replevin shall be pursued, so far as the same can be applied to the jurisdiction having cognizance of the case, and to the circumstances of the Province.”

The next Act we have on the subject is, 14 & 15 Vic. ch. 64, which is to amend and extend the law relating to the remedy by replevin in Upper Canada; and the first clause only enables a party to have his action of replevin for any wrongful taking or detention of his

goods, and damages for the same, in like manner as actions are now brought and maintained by persons complaining of an unlawful distress.

A form of writ, almost the same as that given in 4 Wm. IV. ch. 7, is prescribed.

The Sheriff is not directed by this Act to take a bond, but it is meant that he should, for the fourth section declares that the condition of the bond to be taken by him may be altered in its wording to conform to the writ, and refers to the bond required by 4 Wm. IV. ch. 7.

The 6th section requires the Sheriff to return the writ with the names of the sureties in the bond, with their residences and additions, and the name or names of the witnesses thereto. No provision is made for an assignment of the bond in this Act.

Next comes the Consol. Stat. U. C., ch. 29, and the first clause embraces two kinds of taking of personal property; the one where property is wrongfully distrained under circumstances in which by the law of England replevin might be made: the other, any wrongful taking or detention of personal property for which trespass or trover would lie. This Act merely comprises the provisions of the two Acts before referred to.

The 8th section provides that the Sheriff, before he replevies, shall take a bond, which shall be assignable to the defendant. The bond and assignment may be in the form prescribed. The Sheriff shall return the writ, with the names of the sureties, the date of the bond, and the name or names of the witnesses thereto.

In deciding whether the plaintiff in this action has a right of action under the assignment attested by only one witness, I think we must be governed by the provisions of the Act 4 Wm. IV., ch. 7, for I do not find that any of the subsequent statutes in reference to the action of replevin under a distress for rent, repeals the provisions of that Act, although they extend them to wrongful takings under other circumstances.

The Act 14 & 15 Vic. ch. 64, clearly does not interfere with it, nor does the Consolidated Statute either. For the consolidated Acts, as is said by Draper, C. J., in *Bacon v. Langton*, 9 C. P. 410, 412. "shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and *as declaratory of the law*, as contained in previously existing Acts."

The first case in our Courts in reference to the action of replevin is *Cornell v. Quick*, Dra. Rep. 440; and the late Chief Justice Robinson, and the then Judge Macaulay, afterwards also a Chief Justice, reviewed at great length the law of replevin, and admitted that the remedy or right to the action existed in this country, but stated that we had not officers and courts so constituted as to apply the remedy in favor of persons complaining of a wrongful distress; and it was shortly after this judgment the 4 Wm. IV. ch. 7, was passed, giving us the appropriate machinery for carrying into effect the law as it stood in England.

Whatever was then necessary in England to give a right of action to the assignee of a replevin bond, became also necessary in this country, for as, by section 2 of the Act, the sheriff is required to take a bond according to the law of England, all things done by him in connection with the bond must be according to the same law.

By 11 Geo. II. ch. 19, sec. 23, the sheriff shall, at the request and costs of the avowant or person making cognizance, assign the bond to him by endorsing the same and attesting it under his hand and seal, in the presence of two or more credible witnesses. Now, our statute does not say the sheriff shall, but may, assign the bond; yet I have no doubt the sheriff in this country would, in case of refusal so to do, be compelled to assign if required. At all events, in this case he did assign, but the assignment is attested by only one witness.

We have a case, *Hutt v. Keith*, 1 U. C. R. 478, which was decided shortly after passing 4 Wm. IV. ch. 7, and although the action was by the assignee of a bond, as this is, the question raised in this action did not come up; but I think

enough is said to shew that the law as to taking and assigning replevin bonds, as it stood in England, was that which should prevail in this country. Certainly nothing is said to the contrary, for Chief Justice Robinson in that case refers to the 4 Wm. IV. ch. 7, as the statute regulating the proceedings in replevin; and Mr. Justice Jones, in the same case, says, at page 481: "There is no authority for the sheriff to assign a bond not taken under the statute."

It is only by statute the sheriff is authorized to take or assign a bond at all, and certainly it is only by virtue of his assignment properly made, the plaintiff in this action acquires any right to proceed on the bond; and although the sheriff might have had his action on it, he cannot transfer that right except his assignment be made in conformity with the statute which empowers him so to assign.

That 11 Geo. II. ch. 19, was in force in this country, may be deduced from what Draper, C. J., said in *Mercer v. Hewston et al.*, 9 C. P. 353, with reference to the statutes of Mortmain, that 9 Geo. II. was in force in Canada; but indeed our Act of Wm. IV. so directly adopts the law of England as it then stood in regard to replevin, that little room is left for doubt on that point.

If the point was not one which should be strictly decided according to the provisions of the statutes, I should be disposed to give the plaintiff the benefit of his assignment, but then he should have seen that it was properly executed and attested, for, like the transfer of any other chose in action, unless made according to law no right to sue upon it is conferred.

I find in an old edition of *Chitty* on Pleading a form of a declaration on an assignment of a replevin bond, which states that the assignment was made in presence of two witnesses; and in a note at the bottom, it is said that if the assignment appear on the declaration to be attested by only one witness, it will be demurrable; and reference is made to *Willes* 409.

It seems to me, that both Draper, C. J., and Hagarty, J., the one in *Anderson v. McEwan*, 8 C. P., 534, and the other

in *Crawford v. Thomas*, 7 C. P. 67, draw some distinction between proceedings in actions where trespass and trover will lie as aforesaid as provided for in our Act 14 & 15 Vic. ch. 64, and actions of replevin in England, which chiefly arise out of distress for rent or damage feasant, although it may be brought for any unlawful taking as in this country; but whether the bond and assignment in both cases are governed precisely by the same rules, is not laid down in any of the judgments I have met with. For although the first statute 4 Wm. IV., ch. 7, provides only the remedy of replevin in cases where the action lay in England, the subsequent acts continue the first, but expressly extend the remedy to other unlawful takings as well.

But as before said, the main question here is, "Has the plaintiff a right of action as assignee of this bond?" I have arrived at the conclusion that two witnesses are necessary to such an assignment. Whether they should be attesting witnesses at the time of making the assignment may be open to doubt, but that the proper assignment should be provable by two witnesses, there is none in my mind.

Phillips v. Barlow, 6 C. & P. 781, was a case by an assignee of a bail-bond from the sheriff under 4 & 5 Anne an. 16, sec. 20, and the assignment appeared to have been made in presence of two witnesses, but it appeared in evidence that one of them did not affix his name until after the action was brought. The objection was raised, but Vaughan, J., ruled that it was sufficient. In our case, however, only one witness is at all connected with the assignment.

Our Ontario Act, 35 Vic. ch. 12, providing for the assignment of choses in action, is not applicable to assignment of bail-bond.

Then Mr. Ward contends that the Acts relating to the execution and assigning of replevin bonds are, as to their attestation, not positive but directory.

I would refer him to a case decided only last year in our Court of Queen's Bench, *Regina v. The Great Western R. W. Co.*, 32 U. C. R. 506, There, and in numerous other

cases referred to, he will find that the principle laid down by Baron Martin, in *Bowman v. Blyth*, 7 E. & B. 26, 47, is recognized throughout. Martin, B., says, as quoted by Mr. Justice Morrison, "I will only add, though I do not question that, in construing Acts, language seemingly positive may sometimes be read as directory, yet such a construction is not to be lightly adopted; and never when as in this case, it would really be to make a new law instead of that made by the legislature."

Mr. *Ward* also contends that, if the plaintiffs be entitled to recover at all, they should have a verdict for the penalty in the bond. I think otherwise; and in case this judgment as to the right to recover on the assignment should, on appeal, be reversed, and that the Court appealed to may have the power and think fit to determine the case in full, I should find for the rent in arrear, and costs of defending the replevin suit as far as it went, in all \$70, and I should certify for County Court costs in this case, if asked for, which was not done."

From this judgment the plaintiffs appealed.

The appeal was argued in Easter Term.

Ward, for the appellants. The 11 Geo. II. ch. 19, sec. 23, requires there shall be two witnesses to the assignment. Our Act of 4 Wm. IV. ch. 7, sec. 2 requires the sheriff to take pledges according to the law of England. The assignment is to be according to the schedule in our own Act; but the statute does not require two witnesses. The 11 Geo. II. ch. 19, so far as it related to replevin did not become a part of our law: *Meyers v. Maybee*, 10 U. C. R. 200; see also *Bacon v. Langton*, 9 C. P. 410; *Hutt v. Keith*, 1 U. C. R. 478; and it was necessary we should have special legislation on the subject. Our Statute does not make it compulsory to adopt the form of assignment given in it; it is at most only directory: *Wing v. Taylor*, 30 L. J. Mat. Cas. 258; *Re Morgan and Parry*, 17 C. B. 334; *Commissioners of United States Deposit Fund v. Chase*, 6 Barb. 37; *The People v. Supervisors of Chenango*, 4 Seld. N. Y. Rep. 317; *White v.*

Barrack et al., 1 M. & W. 424. Nor does it require that the bond itself should have two witnesses, nor that it should be according to the law of England. In *Bacon v. Langton*, 9 C. P. 410, the bond was given before the consolidation of the Statutes. As to the construction of statutes which are consolidated, see Consol. Stat. U. C. ch. 1 secs. 5, 9. If the plaintiffs recover on the issue on the assignment, they are entitled to a verdict for the penalty and not merely to damages on the bond: *Bletcher v. Burns*, 24 U. C. R. 259; *Greer et ux. v. Johnson*, 32 U. C. R. 77.

S. Richards, Q. C., contra. The plaintiffs are suing by virtue of a Statute, and they must prove according to the terms of the statute which confers the right. If the 11 Geo. II, ch. 19, be in force here, there must be two witnesses to the assignment: Willes 409, note (a); *Leafe v. Box*, 1 Wils. 121; *Phillips v. Barlow*, 1 Bing. N. C. 433, 6 C. & P. 681; 2 *Ch.*, Pl. 6th ed. p., 324 a. The case of *Cornell v. Quick*, Dra. Rep. 440, shews replevins were in force and in use here before the Act of 1834 was passed. That Act assumes that replevin bonds were assignable: it does not say they shall be so. It gives a form of assignment. Now that assignment was then and yet is and must be under the authority of the Act of Geo. II. The consolidation of the Act of 1834 declares expressly that such bonds shall be assignable. And the Consol. Stat. U. C. ch. 1, secs. 8-9, shews how such an Act is to be construed. The 14 & 15 Vic. ch. 64, extends the remedy of replevin. He referred also to *Wilkinson on Replevin* 143, 144; *Bacon v. Langton*, 9 C. P. 410; *Becker et al. v. Ball*, 18 U. C. R. 192.

The execution of the assignment being by the deputy in the name of and for the sheriff, which had been excepted to was abandoned.

WILSON, J., delivered the judgment of the Court.

In England, under the Statute 4 & 5 Anne ch. 16, the assignment of a bail bond must be executed by the sheriff under his hand and seal, in the presence of two or more credible witnesses.

If executed in the presence of the plaintiff in the action and another person, it is void, because the plaintiff was held not to be a credible, that is, a disinterested, person : *White v. Barrack*, 1 M. & W. 424. In *Neat v. Mills*, Fortesc. 371. Willes 409 note (a) the declaration was held bad because it shewed there was only one witness to the bail bond.

In England, also, under the 11 Géo. II. ch. 19 sec. 23, the assignment of a replevin bond must be executed by the Sheriff, or other officer taking the same, under his hand and seal, in the presence of two or more credible witnesses.

The decisions as to the assignment of bail bonds are commonly referred to as applicable to the assignment of replevin bonds.

An assignment of a replevin bond therefore cannot legally be made if it have only one witness to it. The Statute imperatively requires two witnesses.

The bond which the sheriff takes may not be void if it be taken from only one surety, and so not a compliance with the Act of Geo. II., because he is authorized by the Statute of Westminster to take pledges generally, and the bond may be valid in law : *Austen v. Howard*, 7 Taunt. 28, 327. But such a bond it would seem cannot be assigned.

The question is, whether the same law, with respect to replevin bonds taken on a distress for rent and to their assignment applies here in every particular as it does in England. Is the assignment of the bonds void because not executed in the presence of two witnesses ?

It was decided in *Cornell v. Quick*, Dra. Rep. 440, that the ordinary common law writ which was in use in England, directed to the sheriff commanding him to replevy and to hear the cause, was inapplicable, because the sheriff here had no Court or judicial power. A proceeding was suggested by Mr. Justice Macaulay, by which replevin could be had and prosecuted in this country, but the method was experimental, and would have been difficult, so that the Legislature, by the Act of 4 Wm. IV., ch. 7, gave relief.

The Act assumes that the remedy in some form existed here, for it recited that "it is expedient to facilitate the remedy of replevin."

By section 2 of that Act, before the sheriff replevied, he was required to "take *pledges* from the plaintiff according to the law of England in that behalf." That provision is a good deal altered in the Consolidated Act, sec. 8.

The statute of Westminster the Second, ch. 2, speaks of the sheriff receiving of the plaintiff *pledges*. The Statute of George the Second speaks of them as *sureties*. The form of the bond and of the assignment, it is said, may be in the form given in the schedule.

The forms of bond and assignment are exactly according to the form given in *Wilkinson* on Replevin, including even the "W. P., Esquire, sheriff, &c."

The form of the bond and of the assignment in each case concludes, "Sealed and delivered, in the presence of," but nothing is said expressly of witnesses, or of their number.

The remedy of replevin was expressly extended by the 14 & 15 Vic. ch. 64; and the two Acts were consolidated by the Consol. Stat. U. C. ch. 29.

The 9th section of the Act of 1834, which provided that in the absence of any provision in the Act, or in any rule of the Court of King's Bench to the contrary, the practice in England in cases of replevin should be pursued, so far as the same could be applied to the jurisdiction having cognizance of the case, and to the circumstances of the Province, did not apply to or affect the question of the number of witnesses there should be to an assignment, but to the proceedings in the action which the Court could regulate.

The 9th section professes to be contained in the Consol. Stat. U. C., ch. 29, sec. 14, and that shews that the former section had reference to pleading and proceeding to trial and judgment.

The whole case then turns on this: By the Statute of 11 Geo. II., ch. 19, the assignment of the bond must be executed in the presence of two witnesses, and when our Act, Consol.

Stat. U. C. ch. 29, sec. 8, declares that the sheriff shall take a bond, which shall be assignable; and that the bond and assignment may be as in the schedule to the Act; and although that section be read with the light of the 4 Wm. IV. ch. 7 sec. 2, that the sheriff "shall take pledges according, the law of England;" does that mean, that the assignment shall be executed in the presence of two witnesses, because the Statute of George the Second recognised two witnesses in such a case?

The sheriff is to take *pledges* according to the law of England. That he has done. But what is the law of England in that respect? It is that which is contained in the Statute of Westminster, as well as that which is contained in the Statute of George the Second.

A bond taken under the former Act was held to be valid: *Austen v. Howard*, 7 Taunt. 28, 327; but not to be assignable, because not made assignable by it.

By that Act no particular form of bond was required to be given, so long as it provided for the prosecution of the suit, and for a return, if a return were awarded.

This bond, in my view of the case, is sufficient, whether by the law of England or by our Statute.

The *assignment* is not required to be according to the law of England. If it had, that could have had reference only to the 11 Geo. II., ch. 19, and then two witnesses would have been certainly required. It is merely declared, that it may be in the form given in the schedule, which says nothing of the number of witnesses.

The learned Judge of the County Court, who has treated the case with great care and ability, was of opinion that, "whatever was necessary in England to give a right of action to the assignee of the replevin bond, became necessary in this country; for as, by section 2, of the Act of 1834, the sheriff is required to take a bond according to the law of England, all things done by him in connection with the bond must be according to the same law."

That all things done by the sheriff with the bond must be done according to the law of England, (which is the

point in this case), is a conclusion which does not follow from the provisions of our Statutes. They lead, in my opinion, not to that conclusion.

The sheriff was required to take *pledges*, not a bond, according to the law of England. The pledges however were to be by bond. The bond is quite right in all respects. The law of England referred to, does not mean necessarily and exclusively the Statute of George the Second, and it is not of course that the *assignment* must be according to that Statute. It is according to our own Statute, the Act of 1834, as well as the Consolidated Act and I think we should not introduce more of mere ceremonial than is absolutely required.

The case of *Meyers v. Maybee*, 10 U. C. R. 200, is an authority for this construction of the Statute; and *Phillips v. Barlow*, 1 Bing. N. C. 433, shews that we should not in this instance superadd anything which our Statute has not expressly enacted of only a formal kind.

I am of opinion that a witness and a subscribing witness is required by our Act, because the form in the statute contains at the end, "Sealed and delivered in the presence of," indicating that the person in whose presence that was done should add his name at that place. When that has been done the Statute has been complied with. And as the Statute does not say that two persons shall subscribe as witnesses, there is no reason why we should require it.

As to the damages, it rather appears the plaintiffs are entitled to a verdict for the penalty of the bond: *Bletcher v. Burn*, 24 U. C. R. 259.

In no case can the plaintiff recover more than the penalty and his costs; *Hefford v. Alger*, 1 Taunt. 218; *Brunscumb v. Scarberry* 6 Q. B., 13.

But the Court can regulate and control such bonds in like manner as bail bonds; and if the damages were assessed at \$70, the Court would never permit them to recover more than that sum. The plaintiffs have proceeded rightly here by assessing their full damages—for the practice of taking only \$4 as a nominal sum, and proceeding in a sub-

sequent suit for full damages, it is said, is not justifiable : *Gibb v. Cruikshank*, L. R. 8 C. P. 454.

This Court, therefore, directs that the rule of the Court below of April Term last, discharging the rule nisi of the 6th of January last, shall be discharged by the said Court ; and that the said Court shall make absolute the rule nisi of the plaintiff setting aside the nonsuit, and directing a verdict to be entered for them on the leave reserved at the trial for the amount of the penalty of the bond, \$150, and the damages assessed at the trial, \$70. There will be no costs of the appeal to either party.

Appeal allowed.

ECCLES V. LOWRY.

Action on covenants for title—Right to recover costs of Ejectment.

The plaintiff having been ejected by the heirs of H. L., sued under the covenant for quiet enjoyment in a deed from H. L., and under a covenant in a mortgage subsequently made by the plaintiff to H. L. by which the plaintiff was to be undisturbed until default in the mortgage, and a verdict was rendered for the plaintiff with 1s. damages on the second count.

Held, that plaintiff was not entitled to increase these damages by the costs of the ejectment suit for it appeared that the mortgage was not set up by the plaintiff in that suit, and if it had been he might have been successful in it.

DECLARATION.—The first count was for breach of a covenant for quiet enjoyment, contained in a deed of conveyance of land from Hamilton Lowry, the intestate, to the plaintiff, dated 31st March, 1864.

The second count was for a breach of covenant made by Hamilton Lowry, the mortgagee, contained in a mortgage from the plaintiff to him, dated the 4th of April, 1864, by which the mortgagee agreed to leave the mortgagor in possession until default.

These two counts are set out in the argument of the demurrer in this case, 32 U. C. R. 635.

The third count was for claims such as are usually contained in the common counts, against the defendant as administrator.

The first and third pleas denied the making of the two deeds.

The second and fourth pleas set up the defence of insanity to the three different counts.

The fifth plea was never indebted to the third count.

The seventh plea was *plene administravit*.

The eighth plea to the first count alleged that the plaintiff, after making the said covenant, and before the breach of the covenant, conveyed the lands back to the intestate, and did not again become seized of the said lands.

The ninth plea was a special plea, and is set out in 32 U. C. R. at pp. 636-7.

The tenth plea was set-off.

The plaintiff took issue on the first six pleas. He took judgment of assets *quando* on the seventh plea.

He replied, denying the deed in the eighth plea, and taking issue on the residue of it; and he also replied equitably to it, which replication was demurred to, and was given up by the plaintiff as bad on the argument: 32 U. C. R. 638.

The sixth and seventh replication denied the making of the deed in the ninth plea.

The seventh replication traversed the residue of it.

And the plaintiff demurred to the ninth plea also, on, which he obtained judgment: 32 U. C. R. 635.

Joinder of issue and in demurrer followed.

This cause was tried at the Perth Spring Assizes before Morrison, J., when a verdict was rendered for the plaintiff on the issues on the second count, with one shilling damages, with leave to the plaintiff to move to increase them to the sum of \$511.13, if the Court should be of opinion he was entitled to recover for the claim he made to recover as damages the costs of defending the action of ejectment which the heirs-at-law of the late Hamilton Lowry brought against him, and the amount which he had to pay to them

for their costs in that action; and the verdict was for the defendant on the residue of the record.

In Easter Term last *Ferguson* obtained a rule *nisi* to increase the verdict as above mentioned.

In this term *Patterson*, Q. C., shewed cause.

The plaintiff having had a covenant for title, was warranted in defending an action of ejectment at the risk and expense of the covenantor, and he will be entitled to recover the costs he was put to, according to the general rule, unless this case can be excepted from it. It is submitted it can, because the plaintiff in his second count claims damages in respect of an interest in land in question in the ejectment suit, and he did not set up in that action the title he had by the mortgage. He referred to *Smith v. Compton*, 3 B. & Ad. 407; *Stubbs v. Martindale*, 7 C. P. 52; *Williams v. Burrell*, 1 C. B. 402.

Ferguson supported the rule. If the plaintiff reasonably defended the ejectment suit he is entitled to recover the costs he was put to in that suit, resting as he did on the covenant for title: *Addison* on Torts, 4th ed. 995; *Addison* on Contracts, 6th ed., 1067; *Ronneberg v. The Falkland Islands Co.*, 17 C. B. N. S. 1.

WILSON, J., delivered the judgment of the Court.

The jury found the intestate to have been sane when he executed the mortgage. On that finding alone the plaintiff should not recover the costs of the ejectment suit, because in that suit he did not make use of nor rely upon the mortgage, and if he had done so he might have been successful in the action.

The first and third counts were not considered at all. The first count may not have been considered because there was a plea, which was not disputed, alleging that before the breach of the covenant in the deed the plaintiff had conveyed away his estate in the land—that is, he had made the mortgage to the intestate. The verdict was for the defendant on the first and third counts, and for the plain-

tiff on the second or mortgage count. There was nothing shewn in this suit to impeach the propriety of the finding in the other suit, and there was no claim for damages in the suit made but in respect of the mortgage covenant, and that covenant was not relied upon by the present plaintiff in the former suit. We fear we must discharge the rule.

Rule discharged.

GREEN V. THE BEAVER AND TORONTO MUTUAL FIRE
INSURANCE COMPANY.

C. S. U. C. ch. 52—31 Vic. ch. 32, O.—Mutual Insurance—Assessment before Policy—Liability for.

An insurer with a mutual insurance company is not liable for assessment made before his insurance was effected, or premium note given.

At the trial the learned Judge so ruled, and refused to allow defendants to plead a subsequent assessment made after the policy. The Court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed.

ACTION on a fire policy, issued by the defendants, a mutual company.

Plea—after setting out sections 3 and 5 of 29 Vic., ch. 37 (a), stated—that in accordance with the provisions of the said Act, the said sections 3 and 5 were duly endorsed on the policy, and that losses occurred to the Company, and assessments were made on the premium notes of the parties insured, in order to pay the said losses, and on the 19th of October, 1869, an assessment was made of \$13.86 on the premium note of the plaintiff, of which the plaintiff had notice; that the plaintiff neglected to pay the same, &c.,

(a) 29 Vic. ch. 37, sec. 3, enacts in effect, that no action upon policies granted by mutual companies shall be brought after the lapse of one year next after the happening of the loss, and provides that this section shall be endorsed on the policy. Sec. 5 enacts that the policy is to be void if the sums assessed on the premium notes are not paid in thirty days after they become payable, the insured to remain liable. The directors, however, may waive the forfeiture—upon the insured complying with terms to be imposed by them. This section is also to be endorsed upon the policy.

for thirty days after the same became payable, and there-upon under the terms of the said Act the policy became void, and the plaintiff is not entitled to compensation for any loss or damage arising under the policy.

Replication—1. That no assessments were made on the note as alleged. 2. That no notice of the alleged assessment was given to the plaintiff. 3. That such assessment did not remain in arrear for thirty days. 4. Waiver by defendants of the alleged forfeiture of the policy, &c.

Issue on the replication.

The case was tried before *Galt*, J., at the last Spring Assizes at Toronto.

On the trial it was proved that the plaintiff's tavern, stable, and shed, were totally destroyed by fire, being the premises insured.

For the defence a person in the employ of the defendants was called, and produced the original application of the plaintiff for the insurance, and the premium note of the plaintiff for \$66.00, both dated 19th October, 1868. The plaintiff at the time paid \$5 cash. The witness then proved that on the 16th of January, 1868, at a board meeting of the Company, the following order and assessment was made: "That an assessment of one-third of two-thirds of the premium notes to be made, and is now declared upon each policy at the end of twelve months from the date thereof. Approved.

(Signed) RICHARD L. DENISON."

The defendants contended that for non-payment of this assessment and which it was contended applied to the plaintiff's note, dated the 19th October, 1869, the policy was void.

The learned Judge was of opinion that no assessment could be made prospectively, and that the defence failed.

To this ruling the defendants' counsel objected, and he applied for leave to amend and plead another assessment, which amendment was refused, and a verdict was entered for the plaintiff for \$675.00.

In last Easter Term *Harrison*, Q. C., obtained a rule to set aside the verdict for misdirection, in ruling that the assessment was not a valid one, and in refusing to amend the pleadings to permit defendants to shew a subsequent assessment not open to the objection raised against the assessment proved.

During this term *Hodgins*, Q. C., shewed cause. The Statutes authorize assessments for two purposes—for losses, under Consol. Stat. U. C. ch. 52, and for a reserve fund under 31 Vic. ch. 32, O. The assessment in question was for losses, and should have been for losses accruing during the plaintiff's policy. The various sections of the Consolidated Act shew that a policy holder is only liable for losses while the policy is in force. The assessment in question was made on the 16th January, 1868, and the plaintiff did not become a member until the 19th October, 1868. The contract was a mutual one, the company agreeing to pay the member's loss, and the member agreeing to pay his share of the company's loss during the term. He referred to *Ellis v. Beaver, &c., Mutual Insurance Co.*, 21 C. P. 84; *Devendorf v. Beardsley*, 23 Barb. 656; *Mutual Benefit Life Insurance Co. v. Jarvis*, 22 Conn. 133.

Harrison, Q. C., contra. The plaintiff is in default, however the facts are put. He has never paid any assessment, though two assessments were actually made. Evidence as to the second assessment was offered and rejected at the trial. Whether then the assessment is to be taken as made twelve months from the date of the policy, or twelve months from the date of the resolution, the plaintiff is in default. The power to assess given by the Consolidated Statute is very wide. He referred to *Angell on Insurance* 2nd ed., secs. 419, 423; and *Trumbull County Insurance Co. v. Horner*, 17 Ohio 407.

MORRISON, J., delivered the judgment of the Court.

In this case, the plea of the defendants sets out that losses having occurred, assessments were made on the premium notes of parties insured in the defendants' com-

pany in order to pay such losses, and on the 19th October, 1869, an assessment was made on the premium note of the plaintiff, which he did not pay, and the policy became void.

Now the evidence of the assessment to establish that plea, and relied on at the trial, was a resolution of the directors of the defendants' company, of the 16th of January, 1868, (nine months before the application of the plaintiff for insurance,) directing the levy of an amount equal to nearly one-fourth of the plaintiff's premium note.

The language of the resolution is not very precise, or clear as to its application to after-made policies. It is not necessary to criticise it. According to the defendants' contention it meant and was intended to be an assessment beforehand upon all premium notes given upon future policies.

No authority was pointed out to us, shewing that the defendants had power thus to anticipate losses, or to declare or make assessments on premium notes and policies not given or issued, but to be issued in the future.

The provisions of the Statutes bearing upon the Mutual Companies point to a very different conclusion: viz., that it is after notice of losses by fire that the company shall settle and determine the amount to be paid by the members of the company; and it is, I think, clear from the various provisions of the Statutes, that the plaintiff was only liable for the proportion of losses and expenses accruing while his policy was in force, and that the amount of that proportion must be determined by assessment.

These defendants, by a special Act, 27-28 Vic., ch. 99, sec. 3, have special powers to form a reserve fund, and they may levy an annual assessment on the premium notes held by them for that purpose; but no assessment for any one year shall be over one-third of a dollar in each \$100 of insured property, which in the case of this plaintiff would amount to \$2.00.

All the Statutes provide for only assessments on notes *in esse*. It would be an unreasonable power, and quite

inconsistent with the principles upon which Mutual Insurance Companies are based, if the directors could, before a policy was issued and a premium note given, declare beforehand that within any period an assessment on the deposit note to any amount was payable.

We are therefore of opinion that the ruling of the learned Judge at the trial was correct, and that the rule should be discharged.

It was further contended, that the learned Judge should have allowed at the trial an amendment, or rather a new plea to be added, of a subsequent valid assessment, &c., and nonpayment of it by the plaintiff.

There is nothing before us to shew any ground for such an application, or that any such assessment was made, and nonpayment by the plaintiff; and as the defendants on this application have filed no affidavit in support of such an amendment, we think a new trial should not be granted on that ground.

We therefore think that the rule should be discharged.

Rule discharged.

MINGAYE V. WHITE.

Sale goods to be selected—Money paid under mistake of fact—Right to recover back.

Defendant sold by a bill of sale to the plaintiff his good will, lease, and certain druggist's stock thereafter to be selected, to the amount of \$5,700. One P. selected the stock from the stock list for the plaintiff, who paid the \$5,700, and by some oversight a lot of lamp cleaners to the extent of \$173, were charged and paid for as part of the \$5,700, which, as the jury found, neither P. nor the plaintiff had ever chosen or accepted. Defendant having refused on application to take away these lamp cleaners, or repay the \$173,—

Held, reversing the judgment of the County Court, that, notwithstanding the bill of sale, the plaintiff was entitled to recover back the \$173 as money paid under a mistake of fact, and without consideration.

APPEAL from the County Court of Frontenac, making absolute a rule for a nonsuit.

Declaration for money had and received ; with a special count, not necessary to be set out for the purposes of this report.

At the trial in the Court below, the real question appeared to be whether the plaintiff was entitled to recover back, as money had and received, money paid by him to defendant under a mistake of fact.

It appeared that the defendant, by a bill of sale sold to the plaintiff his good will in his business as a druggist, &c., and the lease of his premises, for \$7,500, which included a certain amount of his, the defendant's, stock in stock in trade, drugs, &c., and other effects, which amount was to be taken, chosen, and picked out of the general stock of the defendant, to the value of \$5,700.

It also appeared that one Polson was employed by the plaintiff for the purpose of selecting and choosing the stock to be taken. From his evidence it appeared that he did make selections, as he stated, in rather a hurried manner, as the defendant was anxious to close the matter, and get his money as soon as possible, it being understood that any errors would be corrected ; that certain stock was selected by a stock list, to the amount of \$5,700 ; that the plaintiff paid the amount ; that some errors were discovered, which were rectified by the defendant, in respect of goods not required by the plaintiff.

A considerable portion of defendant's stock remained on the premises, after selecting the \$5,700, which was removed by the defendant from time to time. Eventually a large quantity of an article called lamp cleaners was left on the premises. Polson looked to see if these articles were included in the stock paid for by the plaintiff. He examined the stock list where he expected to find them, under the head of lamp stock, but they were not entered. Afterwards he accidentally found that they were charged in the cellar stock book, among brandies, wines, and snuff.

The evidence went to shew that these lamp cleaners were an unsaleable article, and at all events the quantity entered was an amount far beyond what was required in a

retail business, and the witness Polson stated, that he would not have selected the lamp cleaners for the plaintiff, and in fact that he did not chose or select them.

It appeared also from the plaintiff's testimony, that he knew nothing of these goods, and never accepted them; and that when found in the premises in an out of the way place, they were supposed to be a portion of the defendant's stock. On its being discovered that they were charged in the stock list, and included in the \$5,700, and valued at \$173.50, defendant was notified of the fact, and of their not being selected or accepted. He refused to remove them, or to repay the amount.

It was objected at the close of the plaintiff's case that the bill of sale was a complete agreement in itself, and that no oral evidence was admissible to add to or vary it, and that there was a complete sale of the goods.

The learned Judge overruled the objections, reserving leave to enter a nonsuit.

After evidence given on the part of the defendant, the case was left to the jury, who found in favour of the plaintiff.

A rule *nisi* being afterwards granted to enter a nonsuit on the leave reserved, it was made absolute; the learned Judge in his judgment stating, that the plaintiff could not sustain the verdict on the count for money had and received: that what he sought to recover was the value of the goods which he desired to throw back on defendant's hands, but that there was no agreement which the Court could look at, by which the defendant was bound to pay for any such goods, or to receive them back: that notwithstanding such agreement might have existed, it was invalid and of no force to vary the deed by which alone the parties to the contract were bound.

From this judgment the plaintiff appealed, and the appeal was argued in this term.

George A. Kirkpatrick for appellant. The action lies for money had and received where money has been paid

under a mistake of fact: *Cox v. Prentice*, 3 M. & Sel. 344: *Townsend v. Crowdy*, 8 C. B. N. S. 477, 2 L. T. N. S. 537; *Freeman v. Jeffries*, L. R. 4 Ex. 189: also where there has been a failure of consideration: *Devaux et al. v. Conolly*, 8 C. B. 640; and on both grounds the plaintiff here is entitled to recover. The bill of sale cannot stand in his way, for it specified no goods.

McDonell (of Kingston). No parol evidence could be given except as to Polson's selection. The evidence shewed that his selection was final and complete, and at all events, he could have known what was in the list if he chose, and he must be presumed to have known. He referred to *Goss v. Lord Nugent*, 5 B. & Ad. 58.

MORRISON, J., delivered the judgment of the Court.

The real question upon this appeal is, whether the plaintiff is entitled to recover back, as money had and received to his use, money paid by the plaintiff to the defendant for which it is alleged he received no consideration, but which was paid under a mistake of fact.

Several questions were left to the jury by the learned Judge, and from the finding we may assume that the jury found that the plaintiff did not select, accept, or retain the lamp cleaners in question, as a portion of the goods for which he paid \$5,700; and which, I think, the evidence warranted.

I cannot acquiesce in the view taken by the learned Judge in the Court below.

The bill of sale was merely evidence of the sale of certain goods, which were to be selected and chosen by the plaintiff, to the amount of \$5,700, out of the general stock of the defendant. In order to give effect to the deed, certain portions of defendant's stock were selected, and a stock list of the articles made. In this stock list, which consisted of a numerous variety of articles, by some means were included these lamp cleaners, to the amount of \$173.50, unknown to the plaintiff's agent, who selected the goods, and being articles never accepted or received by the plaintiff, and from the evidence, if brought to the

notice of the plaintiff's agent, they would not have been selected by him as a portion of the \$5,700 worth.

The complaint of the plaintiff is, "I paid you \$5,700, and as part consideration you have charged me with goods to the amount of \$173.50, which I never selected, or received, or agreed to accept, under the agreement for the purchase of your goods. I wish to be repaid that sum, for which I got no value, and which I paid to you under a mistake."

The evidence given by the plaintiff was not given to alter or vary the terms of the deed. It was given to shew that the defendant received money for which the plaintiff received no consideration: that the plaintiff paid the \$5,700 upon the assumption and in the belief that goods to that amount were chosen and selected for him. It turned out however, that with the goods selected there were charged certain goods not chosen, taken, or received by the plaintiff, as the jury found.

It was urged by Mr. *McDonell* that the plaintiff had the means of knowing what was included in the stock list, and that he did not reject the articles although entered there. But, as said by Erle, C. J., in *Townsend v. Crowdy*, 8 C. B. N. S. 493, "It seems, from a long series of cases, from *Kelly v. Solari*, 9 M. & W. 54, down to *Dails v. Lloyd*, 12 Q. B. 531, that, where a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself."

In the present case, the finding of the jury and the evidence established that the plaintiff did not select or receive the lamp cleaners in question; and, as said by Cresswell, J., in *Devaux v. Conolly et al*, 8 C. B. 668, "It appears, therefore, to us to be a simple case of failure of consideration;" and that the plaintiff is entitled to recover the excess paid beyond the value of the goods he selected and received, as money had and received to his use. That being the case, the judgment of the Court below is reversed, the rule to enter a nonsuit discharged, and the verdict for the plaintiff stands.

Appeal allowed.

HOOD V. THE COMMISSIONERS OF THE HARBOUR OF
TORONTO.

Toronto harbour—Sunken pier—Injury to vessel thereby—Liability of Harbour Commissioners.

Held, that the defendants, in whom the harbour of Toronto is vested by 13 & 14 Vic. ch. 80, were not liable to the plaintiff for an injury caused to his vessel by running against an old sunken pier; at a point north of the windmill line, in the line of Church street produced, which street does not extend to the water, for such pier was not within the limits of the harbour as vested in defendants, and they had no power against the owner of the soil to remove it.

DECLARATION.—First count: That the Toronto Harbour was, by the Act of 13 & 14 Vic., ch. 80, vested in the defendants; and it was the duty of the defendants to prepare plans and estimates for the improvement of the harbour, and they were authorized to acquire such property and do all such lawful things as might be requisite to enable them to execute the same; and by reason thereof, and in pursuance of the powers conferred upon the defendants, they imposed and levied tolls upon vessels frequenting and navigating the harbour, and upon the cargoes of the said vessels; and by reason of the premises, and under the provisions of the Act, it became and was the duty of the defendants to maintain and keep the harbour in reasonable repair, and free from obstructions to the free and convenient use and enjoyment of the harbour by vessels frequenting and navigating and using the same; and the defendants for a long time before, and on the third day of July, 1871, neglecting their duty, carelessly and negligently allowed the harbour to become and be obstructed by a sunken crib and pier, and wrongfully neglected to remove the same within a reasonable time after the same was placed there, and after the defendants had knowledge that the harbour had become and was so obstructed: that the sunken crib and pier was below the surface of the water, and obstructed the harbour, and it became and was the duty of defendants to remove the same, and until the same was removed to give notice that the harbour could

not be safely frequented, navigated, and used by vessels, or to place and maintain a buoy or signal in the immediate vicinity of the sunken crib and pier. Averment of breach in that respect; by reason whereof the plaintiff's steam vessel, the *Ontario*, which had before entered the harbour, while lawfully navigating and using the same, for the usual tolls, (and the plaintiff and his crew being unable to see the said sunken crib and pier, and having no knowledge thereof,) struck against the same, and was wrecked thereon and greatly damaged. Averment of special damage.

The second count charged that it was the defendants' duty to maintain and keep the harbour, and the navigable approaches thereto, and the approaches to the wharves and piers in and adjacent to the said harbour, and the navigable approaches, and navigable water and channel lying between the said harbour and the wharves and piers in, by, adjacent to, and near the harbour, and the wharves and piers used by vessels frequenting and navigating the said harbour, in reasonable repair; and to place and maintain buoys or other signals along the limits of the said harbour, to point out to persons frequenting, using, and enjoying the harbour, the limits, boundary, and extent thereof, and of the navigable water in the said harbour. It then averred a breach of such duty and resultant damage.

Pleas,—1. Not guilty.

2. The duty of the defendants was not nor is as it is alleged.

3. To the first count: that the sunken pier or crib in that count mentioned, and the land wherein the same was lying and being, were and are, and each of them was and is, the property and freehold of one Dixon, and were not, nor are, nor was not, nor is, the property of, or vested in the defendants; nor have the defendants any jurisdiction, power, authority, or control over the said land, or pier, or crib, or the water covering the same, or any part thereof.

4. To the second count: the same as the third plea to the first count.

Issue.

The cause was tried before Hagarty, C. J. C. P., at the Toronto Assizes, in the Spring of 1872.

The following evidence was given: *Charles Hood*, the plaintiff, said: I am captain and owner of the tug *Ontario*, I owned her since the spring of 1871. She is two years old. On the 3rd of July, 1871, we were at the Northern Railway Dock, and came down to tow the *Helen*, which lay at Chaffey's wharf. I intended to back in alongside of her. As we backed in slowly we struck heavily on a sunken crib, and slid up on a big stone. We did not know there was any sunken pier there. A few days before I had gone over this safely, how I don't know. There was two and a-half feet depth of water over the highest point of the pier. All was under water; where I struck was on the highest point of the pier. We drew over seven feet of water. It presented a sloping surface. Since then I have found that many schooners had been on this pier. We succeeded in getting her off in about three-quarters of an hour; we found the steam tube knocked in. It was a windy day. On getting to the *Helen* we found we had three feet of water in the hold; we rigged a pump; the water gained on us. I took her up to another place and ran her ashore on a shallow; made a coffer-dam. We got two big pumps and worked her out: her wheel was broken and shaft bent. A large block supported the shaft. The rudder was bent. We worked all night. I took advice and had her towed down to the Don. We hauled her stern out. We struck about 147 feet west of Church Street wharf. The point struck is on the extension of Church Street. The water is now much fallen. The piece of our iron wheel is now there. I point on the plan produced where it now lies.

David Sylvester said: I am the wharfinger at Church Street wharf. I stood on the wharf when the *Ontario* struck; she struck about 150 feet from me. The obstruction slopes every way from the highest point. It is 147 feet from the wharf. I think she struck on the point

marked on the plan on the east side of the sunken pier, and nearest to my wharf. There is no buoy to mark it as dangerous. A buoy was put there soon after the accident. Defendants dredged alongside of our wharf, about 150 feet, in 1870, and the harbour dredge has worked there at other times; we had asked to have this done. They did it at their own expense. The plaintiff's vessel slid up after she touched; her stern was up higher than the rest.

In cross-examination he said: I cannot say whether the vessel struck on the continuation of Church Street or not.

James H. Hickman said: I was on the wharf near Sylvester when the vessel struck. We knew there were sunken cribs there, but did not know their exact position. Accidents had occurred there, A yacht had sunk there. All the water between the wharves is navigable water. Her stern raised up. I paced from forty-nine to fifty paces on the ice to where she struck, in a straight line.

Samuel Gorrie, spoke of the defendants having dredged alongside of the Church Street wharf, in 1866, 1867, and 1870, and that the *Ontario* struck on the south-east corner of the sunken crib.

John Greenfield said: I felt where the piece of plaintiff's wheel is. I saw the surveyors at work, and according to their marks the piece of metal would be on Church Street, inside the line about five feet.

Frederick Passmore, P.L.S., said: I made the plan produced. The pier is partly on Church Street produced, and partly to the west of it. The south-east end has been knocked over. It slopes. The point shewn me by plaintiff, where the vessel struck, was eight feet on Church Street, produced. That part is all north of the wind-mill line. As originally built part of the pier was on Church Street, certainly. I made it a square on the plan. I did not find the south-east point. I did not find it a square. The south-east corner is knocked away, all on to Church Street.

Robert Maitland, said: I once leased the Church Street wharf. In 1850 or 1851 I spoke to the Harbour Master of those old piers. Part of them was above the water. I spoke of them as an obstruction to navigation.

Frank Jackman and *Thomas Graham* were also examined, they added nothing material. A by-law of the defendants was produced, No. 2.

For the defence *Walter Strickland*, P.L.S., was called and said: I made a plan now produced on the 25th of September, 1871. I carefully examined this pier. I placed pickets at each corner. I could trace the round of the timbers. I made three feet six inches of the south-east corner (of the pier) to be within the line of Church Street. I look at plan attached to patent. The lot is lettered A, west of Church Street. About as much as twenty-two feet of the south side of the crib is west of Church Street. No part of the crib was then above the water. I sounded four feet six inches depth at the south-east corner to two feet nine inches. My furthest measure at the south-east was where the timber was, beyond that stone had fallen further east from the timber; but I think there was nine feet of water over the stone.

Sundry objections were taken by way of motion for a nonsuit.

It was agreed that it should be referred to an arbitrator to decide what the plaintiff's damages should be assessed at, if the defendants were liable in law; the Court to decide the question of liability, with power to draw inferences of fact; and leave to move for a nonsuit on the whole case was reserved.

The verdict was entered for the plaintiff, and the damages were assessed at \$2,000 on this arrangement.

In Michaelmas Term last a rule as of the previous Easter Term (a), was obtained by the defendants, calling on the plaintiff to shew cause why the verdict rendered should not be set aside, and a nonsuit entered on the leave reserved at the trial, or why a new trial should not be had between the parties, on the grounds disclosed in the affidavits filed, the verdict being contrary to law and evidence.

(a) See *Hood v. Harbour Commissioners*, 33 U. C. R. 148.

In Easter Term, *Harrison, Q. C.*, and *J. K. Kerr*, shewed cause. The plaintiff's vessel sustained damage, and by the sunken pier, situate partly on the line of Church Street, and partly on the property to the west of it. The evidence shews the damage was done by that part of the pier which was in the line of Church Street. The pier was an obstruction to the navigation of the harbour. The City may be liable for the obstruction on the line of the street as owners of the soil; but the defendants are liable also as owners of and as a body controlling the harbour by Statute, and holding it out for public use, and levying tolls for such use. The harbour consists of the whole of the navigable water where ships may navigate or lie in safety: *Webb v. Port Bruce Harbor Co.*, 19 U. C. R. 615. And whether the navigable water is on public or on private soil and freehold is immaterial. In this particular case the harbour was improved by a grant of public money under the 3 Wm. IV., ch. 31, and was afterwards transferred to, and vested in the defendants as a corporate body by the 13 & 14 Vic. ch. 80; and by sec. 9 subsec. 1, of that Act, the commissioners are enabled and required to keep the harbour in repair. That power and duty charge the defendants with corresponding responsibility: *Parnaby v. The Co. of Proprietors Lancaster Canal Co.*, 11 A. & E. 223, 241; *Metcalfe v. Hetherington*, 11 Ex. 257, 5 H. & N. 719; *Gibbs v. The Mersey Docks & Harbour Trustees*, 1 H. & N. 439, 3 H. & N. 164, 439, L. R. 1 H. L. 93, 3 H. & C. Add'l Cas. 1035; *Sweeney v. The President &c. of Port Burwell Harbour Co.*, 17 C. P. 574, 19 C. P. 376; *Coe v. Wise*, L. R. 1 Q. B. 711; *Manley v. St. Helen's Canal & R. W. Co.*, 2 H. & N. 840; *Hartnall v. The Ryde Commissioners*, 4 B. & S. 361; *Ohrby v. Ryde Commissioners*, 5 B. & S. 743; *Shoebottom v. Egerton*, 18 L. T. N. S. 889; *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458, 471; *Ross v. Corporation of Portsmouth*, 17 C. P. 195. It is sufficient to make the defendants liable for negligence in not removing such obstructions, that they had the means of knowing they existed, and did not make use of such means: *The Mersey Docks & Harbour Board v. Penhallow*,

7 H. & N. 329; *Thompson v. North Eastern R. W. Co.*, 3 L. T. N. S. 618, 7 Jur. N. S. 307; *The Sub-Marine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759. But there is ample evidence to shew the defendants had actual notice and knowledge of the obstructions, and of their dangerous nature. The defendants could have excused themselves if they had shewn, and it rested upon them to shew, that they could not by reasonable diligence have discovered the condition of the harbour: *Kearney v. The London &c., R. W. Co.*, L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; *Longmore v. G. W. R. Co.*, 35 L. J. C. P. 135, 19 C. B. N. S. 183; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Scott v. The London & St. Katherine's Docks Co.*, 3 H. & C. 596; *Burke v. Manchester, &c., R. W. Co.*, 22 L. T. N. S. 442; *Saunders on Negligence*, 49; *Berryman v. Port Burwell Harbor Co.*, 24 U. C. R. 34; *Webb v. Port Bruce Harbor Co.*, 19 U. C. R. 623. Whether the obstruction was within the harbour or not, or was within a part of the waters of or connected with the harbour, arises more particularly on the second count. And it was the duty of the defendants to have placed buoys or signals in dangerous places in or connected with the harbour, to have warned persons resorting to it of such danger: *Shearman & Redfield on Negligence*, 2nd ed., secs. 585, 291. He also referred to *The Buffalo & Lake Huron R. W. Co. v. The Town of Goderich*, 21 U. C. R. 97; *The Queen v. Meyers*, 3 C. P. 305, 320; and to the by-laws of the defendants put in at the trial.

J. H. Cameron, Q. C., supported the rule. The defendants do not dispute the proposition, that there is no legal difference as to liability, whether the defendants receive the tolls they levy for their own private use or for the purposes of the trust they represent.

The first count refers to the harbour only. The harbour which is vested in the defendants is to the south of the Windmill line, and does not extend to the place where the plaintiff's vessel was injured, which was to the north of that line. The Crown has always exercised the right of soil and of ownership over the frontage upon the waters

of the harbour, and upon the soil or land covered with water, for a considerable distance out from the shore, by making grants to private persons, and to the City, of water lots on the shore, and extending from the shore a considerable way into the waters of the harbour. And the different Acts of Parliament passed respecting the Toronto Esplanade establish also, that all the soil covered with water south of the windmill line is, and has been for some time, or is to be, granted as private property. The sunken crib was either on the property of the City or on that of some private person, and in either case the defendants are not liable. They could not remove the crib nor compel its removal, any more than they could remove an erection or wharf which stood above the surface of the water upon private property. Those who put or maintained the crib where it now is, are the persons liable for the damage it has occasioned, if any one is liable: *White v. Crisp*, 10 Ex. 312; *Brownlow v. Metropolitan Board of Works*, 16 C. B. N. S. 547; *White v. Phillips*, 15 C. B. N. S. 245; *Bartlett v. Baker*, 3 H. & C. 153; *Manley v. St. Helen's Canal & R. W. Co.*, 2 H. & N. 840; *Thompson v. The N. E. R. W. Co.*, 2 B. & S. 106, 109 (a).

WILSON, J., delivered the judgment of the Court.

The decision in the *Mersey Docks & Harbour Trustees v. Gibbs*, L. R. 1. H. L. 93, and in former reports, 3 H. & N. 164, and that in *Mersey Docks & Harbor Board v. Penhallow*, 7 H. & N. 329, have finally determined, that a corporation which has been intrusted by Statute to perform certain works, and to receive tolls for the use of them,—although such tolls are to be wholly devoted to the maintenance of the works,—is liable for its own or their servants' negligence, in the like manner as a private body or a private person who has the like powers, and is entitled to apply the profits of the works to private purposes in the ordinary course and gain of trade; because "A ship owner

(a) See, also, *Joliffe v. Wallasey Local Board*, L. R. 9 C. P. 62. Rep.

who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehouseman, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. * * And he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid,"—Per Blackburn, J., in *Mersey Docks and Harbor Trustees v. Gibbs*, L. R. 1 H. L. 107.

The defendants, by the 13 & 14 Vic., ch. 80, are possessed of the harbour of York referred to, and improved under the authority of the earlier Acts 3 Wm. IV., ch. 31, and 7 Wm. IV., ch. 64, and they are empowered to improve the harbour, and to acquire such property as may be requisite to enable them to do all things necessary for such purpose; and to regulate the use of the works and the persons who use them, and the vessels which come into or use the harbour, and to impose and levy tolls and fines, and to detain the vessels or goods until the tolls are paid, and to sell the same if the tolls are not paid within one month, and to employ persons, and to assign to them such duties as they may deem expedient.

The tolls are to be devoted entirely to, and for the benefit of the harbour.

Under such provisions the defendants are liable in law for all damages sustained by persons by the negligence of the defendants, or of any of their servants, in precisely the same manner and on the like principle by and for which responsibility is laid upon a private person, carrying on business for his personal advantage.

It has been contended here, that the defendants, although falling within the general rule and principle of responsibility for acts of neglect, and for damages resulting from such acts, are not responsible in this case, because the sunken crib or pier, which caused the damage to the plaintiff's vessel, was not within the limits of the harbour which is vested in the defendants, and if within the harbour it was a private erection by the owner of the soil

upon his own property, which he had the power to make, and with which the defendants had not the right to interfere.

The limits of the harbour are not defined, and, in the absence of any exact description of it, it may be difficult to say how far it extends. It would be a matter determinable, I presume, by a jury; for a port in the widest sense of the term may consist of divers ports, as they are understood in popular language, although at a considerable distance from the main port: *The Mayor, &c., of Exeter v. Warren*, 5 Q. B. 773; *The Dock Company of Kingston upon Hull v. Browne*, 2 B. & Ad. 42.

In that way the harbour of York might be held to include properly Ashbridge's Bay; and, though with much less probability, the Humber Bay: 12 Vic., ch. 81, sched. C; 18 Vic., ch. 145.

However that may be, there is no reason to doubt that the *locus* in question was at one time a part of what would be called the harbour. And in and over every part of that harbour, all persons would have the right of navigation and of anchorage: *The Free Fishers of Whitstable v. Foreman*, L. R. 3 C. P. 578, L. R. 4 H. L. 266.

The Crown had the right of granting the soil of the harbour, or of part of it, to a private person. If that person erected a pier or wharf for the purposes of trade, and if it were for the public convenience, it would not be a wrongful erection: *Rex v. Russell*, 6 B. & C. 566, 594.

If the erection were an inconvenience to the public, it would not be allowable: *Rhodes v. Leach*, 2 Stark. 571.

But although it were a nuisance to vessels, no one could injure or remove it unless it was necessary he should use that part of the river or harbour where it stood: *Davis v. Petley*, 15 Q. B. 276.

Notwithstanding the grant of the soil, that would not prevent others from navigating the waters over and on the soil so granted, or of using the soil for anchorage, so long as the soil and the waters upon it remained in their natural state: *Free Fishers of Whitstable v. Foreman*, L. R. 2 C. P. 688, L. R. 3 C. P. 578, L. R. 4 H. L. 266; *Mayor, &c., of*

Exeter v. Warren, 5 Q. B. 773; *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192.

Nor would it prevent the owner of land fronting upon the water lot so granted from passing over it, or over any wharf or other erection made by the grantee upon it, without charge to him or any of those he authorized to pass from his land to the water: *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B. 166.

So, if a highway adjoined upon the water lot granted, the whole public would have a similar right: *Ibid.*

The facts here do not shew whether the *locus in quo* had ever been granted by the Crown to any person, nor whether there was or was not a highway along the water's edge of the harbour.

During the argument reference was made to the Esplanade Acts, and probably much may have been omitted to be proved at the trial, because it was so well known, and it was assumed there was no occasion to prove it.

The Esplanade Act, 16 Vic., ch. 219, recites the grant of letters patent to the City, on the 26th of February, 1840, by which certain water lots, or tracts of land covered with water, situate in front of the City, and certain parcels of land between the top of the bank and the water's edge of the bay, adjoining the said water lots, were granted to the City, for ever, upon trust to lease the water lots, and to build an esplanade of one hundred feet in width along the lots so granted to the City, within three years after the City occupied or leased the lots, and upon the further trust, that so soon as the proprietors of the other water lots to whom the same had been previously granted should have built an esplanade along their lots, the City should convey to such proprietors the extension of their water lots to the windmill line, and also the parcels of land between the water's edge and the top of the bank.

And by that Act the City was empowered to build the whole line of esplanade without the leave or consent of the private proprietors and lessees, and to charge them with the expenses of the work, and all of that has been done.

From these facts, it may be inferred that the whole water frontage of the City to a considerable distance east and west of and including this place, has been granted by the Crown, extending from the top of the former bank of the bay southerly to the windmill line.

And there is nothing to shew that any highway ran longitudinally along the waters of the harbour, or came vertically to them at the place where the southern side of Church Street produced would touch the waters of the bay.

If no highway came there to the water's edge, the public would have no more right to use the soil or the water covering it on the prolongation of Church Street, than they would have the right to use the water and the soil beneath it on any other part of the harbour. And the owner of that water lot would have the right to close it up by a wharf or otherwise against the public.

If a highway did touch the waters of the harbour at that place, that would give the public the right of passing from thence to the water, and over or upon any obstruction placed there in their way to the water, modified of course as the public rights necessarily are by the esplanade legislation.

There was no evidence to shew that what has been called Church Street, produced into the water, is, or ever has been, or ever will be a street at all. It certainly never has been one, and it must therefore be treated as a mere water lot which is owned by the City.

It was stated that in 1850 these old piers were then just as they are now. They were spoken of as the pier where one Bergin formerly had a wharf. The exact time of their construction was not shewn; but if in 1850 they were then old piers, they were probably put there before the city was incorporated in 1834. The fact is, I believe, notorious, they were placed there long before that time.

There is no reason to believe that such a work was done unauthorizedly, or otherwise than in a substantial and serviceable manner, and for a beneficial purpose.

When the City acquired that property southerly to the

windmill line in 1840, these old piers were upon the ground as they are now.

The pier which caused the injury complained of is, it is said, on the line of Church Street if produced, north of the windmill line, and south of the esplanade, or formation of land along the north shore or line of the waters of the bay.

That pier has been assumed to be upon land, as on Church Street produced, belonging to the City in its own right. And it was argued that the City, and not the defendants, were, (if any one was,) liable for the injury done, because the pier was on land owned by the City; and that the defendants were not liable at all, because they had no jurisdiction or authority over the particular locality where the pier was, inasmuch as it was upon private or public property, and lay to the north of the windmill line.

When these piers—on which a wharf was originally erected, but which has since decayed, leaving the piers as part of the foundation—were placed there, we have, as already stated, no reason to believe they were wrongfully put there. The wharf, though occupying part of the navigable waters of the bay, was not necessarily an injury to any one.

It could only have been complained of if it were an obstruction to the common and public rights of the community: *Regina v. Betts*, 16 Q. B. 1022.

No one could therefore have wilfully run against it with his vessel, or otherwise injured it, without being liable for the damage done.

If it were allowed to fall into decay, and to become dangerous to those using it, the owner of it would be liable to any one who was injured by it. The owner too, might be obliged, under some conditions, to light it, so that vessels approaching it in a dark night might know where it was, and if he did not do so he might be liable for an injury resulting from the want of a light.

In constructing the wharf the owner would, while the work done was under water, and dangerous to vessels, be obliged to put buoys or signals to caution those navigating

thereabout of the danger; and if he did not he might be liable for the injury done. So, on removing the superstructure, or if the superstructure wore away by decay, if the remaining part of it were dangerous because concealed under water, or otherwise, the owner would be liable for injury done to a vessel by reason of the dangerous condition of the remaining part.

If the person who put the piers or dangerous parts where they were, abandoned them by reason of decay, or from any other cause not attributable to others, he would require to remove them, or to mark out where they were, so as to be avoided by persons using the water there.

If the person who built the piers sold them in a dangerous state to another, the purchaser would be liable for their continuance, in case of doing damage, in like manner as the one who originally put them there: *Bartlett v. Baker*, 3 H. & C. 153.

But if a vessel injured the wharf or piers so that it could no longer be used, and was not used, and it was abandoned by the person who had theretofore owned it, so that it was in the like condition of a sunken vessel, sunk by unavoidable accident, or by the negligence of others, and if it is to be governed by the like law which applies to such a vessel, the former owner would not be required to remove the cause of danger, nor to give or maintain notice of it, so that it might be avoided.

These views are supported by the cases of *Brown v. Mallet*, 5 C. B. 599; *Hancock v. The York, &c., R. Co.*, 10 C. B. 348; *White v. Crisp*, 10 Ex. 312; and *White v. Phillips*, 15 C. B. N. S. 245.

If it be assumed, that the soil of the bay where the sunken pier complained of was built was the property of the Crown at the time it was built, it would not follow that the Crown was liable for the continuance of the pier and damage caused by it, after the person who built it had abandoned it.

The Crown then granted the soil of Church Street produced, as before mentioned, to the City. The City as such

grantees or owners cannot be liable for the pier remaining where it was long before the time of their acquiring the property ; for they do not in any way make use of the piers : *White v. Phillips*, 15 C. B. N. S. 245, and the other cases before cited.

The City does not claim from the person who built the piers, nor does the City use them, nor claim them in any way, certainly in no other way than as part of the useless soil.

As owners of the soil, therefore, the City is not answerable for the damage which is caused by those sunken piers.

Nor is the City liable because the pier complained of is in the line of Church street produced.

That part of the bay has not been made into a street, and may never be required for that purpose. It remains just as it has always been, land covered with water. While it is so covered the water may be used as the other parts the bay which are covered by water are used. The soil being vested in the City does not prevent that use of the water over it : *Marshall v. The Ulleswater Navigation Co.*, 5 B. & S. 732, L. R. 7 Q. B. 166.

Nor does the fact that the City, by the Esplanade Acts, 16 Vic., ch. 219, and 20 Vic., ch. 80, and by the Crown grant of the 21st of February, 1840, has, in common with the other water lot proprietors, the ownership in fee of the soil of the land covered with water south to the windmill line, with the right to build upon that part so granted to them or to form it into dry land, if they have such power, and I think they have.

Nor does the Municipal Act of 1866, ch. 51. sec. 296, apply here, because the harbour is not vested in the City.

I come to the conclusion that neither the City, nor any owner of soil covered with water in the bay, north of the windmill line, is obliged to remove natural impediments to navigation, such as rocks or banks of sand or gravel, nor to remove impediments of any kind not placed there by themselves, nor with their leave, and not used by them, and in or to which they claim no right or property ; or no more

right or property than as so much mere soil, or as a parcel of the soil; nor, I am disposed to think, if the erection was rightfully erected, (although it is not necessary to go further,) to remove them, although placed there by themselves, or with their leave, if the work which they had done has by accident, or by the wilfulness or misconduct of others, been rendered useless to and has been abandoned by them on that account, and in or to which they claim no kind of property or ownership; although in all or in any of these cases the obstruction or impediment is dangerous to navigation, and causes damage to another.

I am also of opinion, that so long as the water lots, which are all part of the original bay or harbour, are not inclosed or built upon by the owners, but are covered with water, and are in direct communication with the rest of the waters of the bay south of the windmill line, that all persons navigating the harbour are at liberty, without license, and without their act being a trespass, to pass over any and every part of the land covered with water, or the waters of the bay.

Is then that portion of the bay north of the windmill line, and granted by the Crown to private persons, but still in its original condition of land covered with water, a part of the harbour within the jurisdiction of the defendants?

The owners of the soil could not, in my opinion, sink cribs or place any other sunken dangerous obstruction on their soil, without being responsible to those who were damaged by them.

That, I think, would be their duty towards the public, who would have the right to use the waters over these lots, while the lots remained in their natural state.

But does it follow that the defendants, as Harbour Commissioners, are bound to remove or to mark out obstructions from these private lots?

If they are, then they could prosecute the owners of lots for putting obstructions upon their soil, and that, I think, the Commissioners could not do.

It seems to be an anomalous state of things, that all persons using the harbour should have the right to pass over the waters on and of these lots as part of the harbour, and yet not be protected by the Commissioners from injuries caused to their vessels by artificial obstructions on the lots, in like manner as for damage sustained by obstructions to the south of the windmill line.

But the liability of the Commissioners must depend upon the extent of their jurisdiction and powers, and if they have not the jurisdiction over and cannot exercise their powers upon these lots, they cannot be answerable for damage caused by means and at a place which they cannot control.

I think the jurisdiction of the Commissioners is confined to the locality to the south of the windmill line, in all cases where a title has been conferred upon private owners by the grant, and by the operation of the Statutes before mentioned.

They cannot control the owners of the water lots from dealing with them as they please, nor could they charge the owners for anchoring their vessels upon them. Such parts are not within the harbour vested in and under the care and superintendence of the Commissioners.

If the owners were to empty ballast or other material on to their lots for the purpose of filling them up, how could the defendants prevent them? During the progress of that work it might, probably, be dangerous for vessels, but the owners or persons doing the work, and not the defendants, would be liable for damage done by it.

The owners might never finish their work, and it might remain in a dangerous condition. The defendants would not be obliged to remove it.

So, if the owners had filled up their lots and formed the whole into dry land, it might afterwards be washed away, or otherwise partially removed, so as to become dangerous; yet the defendants could not remove the residue as an obstruction to their navigation. The owners might desire to re-instate their work, and might complain if the foundation of it were removed by the Commissioners.

In my opinion the plaintiff has failed to establish a liability against the defendants in respect of the crib upon the land granted to the City.

I desire to add that the reasons, and arguments, and opinions expressed in this judgment are those for which I alone am answerable; the Chief Justice and my brother Morrison neither assenting nor dissenting from the same, but concurring in the conclusion come to, that the defendants are not liable for the injury complained of, because the piers in question are not within the limits of the harbour as vested in the defendants, and they had not and have not the right or power against the will of the owners of the soil to remove the same.

The rule will be absolute for a nonsuit.

Rule absolute.

VIET V. VIET.

Gift inter vivos by parol—Acceptance.

In trover for a stump machine, it appeared that the plaintiff had worked on a farm for defendant, his uncle, since he was ten years old almost continuously until of age. Defendant had stated that he intended to give the machine to the plaintiff if he remained with him until he came of age, and the plaintiff swore that after he came of age defendant said "the machine was the plaintiff's," but he (defendant) wished the plaintiff to let him work it until he got the stumps out. The defendant denied this, and the machine had never been taken away by the plaintiff. It also appeared that when taxed with selling the machine, defendant said he was about to sell his farm, and would then pay the plaintiff.

Held, that if the jury believed the plaintiff's account, there had been a complete gift *inter vivos*, and a verdict for the plaintiff was upheld.

Actual delivery of the chattel is not necessary to such a gift; it is sufficient if the conduct of the parties shews that the ownership of the chattel has been changed.

DECLARATION—First count: Trover for a stump machine.

Second Count: Common count, for work and materials, goods sold and delivered, goods bargained and sold, money lent, money had and received, account stated, and interest.

Pleas—1. Not guilty. 2. To first count, goods not the goods of plaintiff. 3. To second count, never indebted.

4. To same count, payment. 5. To the second count, Statutes of Limitation. 6. To the second count, set-off.

The cause was tried before Galt, J., at the Spring Assizes, at Simcoe.

The whole contest at the trial was whether the stump machine in question belonged to the plaintiff.

The plaintiff was a nephew of defendant. He came to live with the defendant when he was ten years of age. He came of age in 1866, and defendant hired him to work until fall. He left his employ in Christmas, 1866, and did not work for him after that.

The first witness, in relation to the stump machine, stated : "Defendant said to plaintiff, 'If you will be a good boy, and stay with me until you are of age, and help to get my stumps out, I will give you the machine.'" The plaintiff never had the machine in his possession. Defendant sold it in 1868. There was one of plaintiff's fields out of which the stumps were not taken.

Another witness said that in the spring of 1867 he wished to purchase the machine from defendant ; defendant said he could not sell, because it belonged to his boy, meaning the plaintiff. Defendant said the machine had cost him \$190. This took place after the plaintiff had left defendant's employ.

Another witness said the plaintiff had left defendant in 1865. Defendant said if he would work out his time he would give him the machine. On this the plaintiff returned and worked out his time. The witness often heard defendant say that as soon as he got out his stumps the plaintiff was to have the machine.

A cousin of the plaintiff stated he heard defendant say, in 1864, to the plaintiff, he should have the stump machine when he was of age.

The defendant sold the machine in March, 1868, for \$150.

The plaintiff himself said he went to work for defendant in 1856, when he was ten years of age ; he worked for him until he was of age, except about four months. Defendant bought the machine in 1862, and told the plaintiff if he

would work until he was of age he would give him the machine. After he became of age, defendant said the machine was his, plaintiff's, but he wanted plaintiff to let him work it until he got the stumps out. Defendant told him, in 1866, if he would pull the stumps, he, defendant, would pay him for it. In 1870, plaintiff spoke to defendant and taxed him with selling the machine. He replied he had sold it, and was going to sell his farm, and then he would pay him. After selling his farm defendant said he would not pay unless plaintiff sued him. He said he could draw back his promise.

On cross-examination, the plaintiff said, defendant said he would give him, plaintiff, the machine if he would remain with him until he was of age, and help him with his stumps. Plaintiff never took the machine away, or worked with it alone. In the fall of 1866 he had a settlement with defendant, who gave him a note for \$70 or \$80 for his wages after he was of age, and for the value of two steers.

On the close of plaintiff's case, defendant's counsel objected that the stump machine never was the property of the plaintiff. Leave was given to enter a nonsuit on this point.

The defendant being called said, that in 1864 he promised to give plaintiff the stump machine if he worked until he was of age, and was a good boy, and helped him with his own stumps. He said he did not promise the plaintiff the machine in 1865, when he returned, but a week after. He said he told the witness referred to "he would not sell him the machine, because if plaintiff was a good boy, and remained until he was of age, he would give it to him. Defendant said plaintiff left before the stumps were out. He also said, "I never told the plaintiff that the machine was his. I never gave it to him. When I had the settlement he asked for the machine, and I said 'No.' He said, 'You promised it to me;' I said, 'Yes. I said, I promised it when the stumps were out. I said, 'If you will look around, and can say that the stumps are out, you shall have it.'"

The learned Judge told the jury that as for the claim for services, it was admitted that the Statute of Limitations was

a bar ; and that as regarded the stump machine they must be satisfied that the defendant had actually *given* the machine to the plaintiff, not that he had promised it only, before they could find for the plaintiff.

The jury found for the plaintiff—damages \$175.

In Easter Term, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a nonsuit, pursuant to leave reserved at the trial ; or for a new trial, the verdict being contrary to law and evidence, and the charge of the learned Judge who tried the cause.

D. B. Read, Q. C., shewed cause. There was evidence to go to the jury of an express agreement to give plaintiff the stump extractor, and that defendant told him it was his, but he wanted him to let him work it until he got the stumps out of his own place. He admitted that *Shower v. Pilck*, 4 Ex. 478, was an authority against the plaintiff considering the transaction as a gift by defendant to plaintiff. He also cited *Roscoe's N. P. Evidence*, 12th Ed., 848.

M. C. Cameron, Q. C., contra. The promise to give the machine to plaintiff in 1864 was a conditional one, and if not, it was mere *nudum pactum*. The evidence does not shew that he actually gave it to the plaintiff. The plaintiff was living with defendant, as a member of his family, and he was in fact bringing him up. No implied promise to pay wages arises in such a case, and no express agreement was shewn. He cited *Redmond v. Redmond*, 27 U. C. R. 220.

RICHARDS, C. J., delivered the judgment of the Court.

It was not argued that the plaintiff could now sustain an action on the contract to deliver him the stump machine, in consideration that he agreed to serve him until he was twenty-one years of age. It was not shewn when he was of age, but they settled in the fall of 1866, and the defendant gave him his note on a balance then found due for wages, &c., accruing after he was of age. The action was commenced in December, 1872, and it therefore seems probable, that if

suing on the contract the Statute of Limitations would bar the plaintiff's claim.

The only question is, did the defendant make a complete and unqualified gift of the stump extractor to the plaintiff, and did he acquiesce in it.

The doctrine laid down in *Shower v. Pilck*, 4 Ex. 478, that to make a gift of personal property by parol valid *inter vivos*, there must be an actual delivery and change of possession, seems not to be sustained in the later cases. The note to *London and Brighton R. W. Co. v. Fairclough*, 2 M. & G. 691, approved by *Parke, B.*, in *Flory v. Denny*, 7 Ex. 583, states the law to the following effect: "Gifts by parol are incomplete, and are revocable by the donor, until acceptance; that is, until the donee has made some statement, or done some act, testifying his acquiescence in the gift. * * * After acceptance of the gift by parol, * * the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift." See also the notes to *Lunn v. Thornton*, 1 C. B. 381.

In *Winter v. Winter*, 4 L. T. N. S. 640, Crompton. J., said, "Actual delivery of a chattel is not necessary in a gift *inter vivos*. * * It is sufficient to complete a gift *inter vivos*, that the conduct of the parties should show that the ownership of the chattel has been changed."

The Court of Common Pleas has acted on that view of the law in *Regina v Carter*, 13 C. P. 615.

The evidence shews clearly that the defendant stated that he intended to give the article in question to the plaintiff if he remained with him until he was twenty-one. The only evidence shewing an actual gift is that of the plaintiff himself. He says after he came of age defendant said the machine was his, the plaintiff's, but he wanted him (the plaintiff) to let him work it until he got the stumps out. This was, as I understand, after he was of age. Again defendant said, if he, plaintiff, would pull the stumps, he, defendant, would pay him for it. When the plaintiff reproached him with selling the machine, his reply was, that he was going to sell his farm, and that he would then pay him.

The defendant denied that he had ever told plaintiff the machine was his. He never gave it to him.

His own account of the transaction at the time of the settlement was: "He asked for the machine; I said 'No'; he said, 'You promised it to me.' I said 'Yes, I promised it when the stumps were out. If you will look around and say that the stumps are out you shall have it.'" It appeared in evidence that he had sold the place, and the jury probably were inclined to think he had acted disingenuously with the plaintiff, even in his own view of the matter, and were more inclined to believe the plaintiff's account of the transaction than his.

If they believed the defendant did actually give the machine to the plaintiff as his own, and that he only requested to keep it until he took the stumps out, and that the plaintiff assented to this, then the authorities referred to would seem to establish the plaintiff's case.

The subsequent conduct of the plaintiff, in reproaching defendant for selling the machine, and the defendant's promise to pay him when he got pay for his farm, were quite consistent with the view now contended for by the plaintiff.

There seems no very great hardship in compelling the defendant to do what he himself says he intended to do, namely, give the machine to the plaintiff if he remained with him until he was twenty-one years of age.

The technical legal difficulty is got over, if the jury relied on the plaintiff's evidence, as they seem to have done, to shew there was an unconditional gift of the article by the defendant, and acceptance of it by the plaintiff.

We think the verdict should not be disturbed.

Rule discharged.

HARRISON V. JOHN W. FROST.

Mill site—Description of land—Falsa demonstratio—Top of the bank.

On the 9th February, 1852, a patent issued to John Frost, under whom the plaintiff claimed, for a mill-site in Owen Sound, described by metes and bounds, by which, after going "one chain seventy links, more or less, to the top of the bank of the river," it proceeded "then southeasterly, along the top of the bank, to the limit between park lots numbers five and four; then southerly to the southerly limit of the town plot, or park lot No. one, keeping in all places at such a distance inland from the river as will allow of thirteen feet head of water being raised at the mill," &c. It then crossed the river "to a point to which the water will be backed by being raised thirteen feet, as before mentioned, at the mill, and then ran northwardly, eastwardly, and north-westwardly (being the general directions of the river) "keeping always, *as on the other side of the river*, at such a distance inland therefrom as ensures to the mill owner the privilege of raising thirteen feet head water as aforesaid, to the place of beginning."

A well defined bank of the river about thirty feet above the water extended from where the line first mentioned struck the top of the bank to the limit between lots four and five, and then the bank died away into a flat.

Held, that under this patent the limit of the land granted was the top of the bank as far as the limit between park lots four and five, not the line formed by the thirteen feet head of water.

On the 14th of February, 1852, a patent issued to John Frost, (presumably the same person as the patentee of the mill site) for park lots four and five. The description of these lots by metes and bounds was in part "commencing where a post has been planted in the north-west angle of park lot No. five, then north eighty-two degrees forty-five minutes east, nine chains thirty links, more or less, to the water's edge of the mill dam in the mill site block, in the said town aforesaid, by thirteen feet head of water being raised at the mill, then southerly following the water's edge thus formed," &c.

Held, that the first patent could not be controlled by the second; and the latter being to the first patentee, he thus acquired the whole land in dispute, and there was no reason why the description in his own deed, which was according to the first patent, should be qualified by the second.

DECLARATION : *Trespass quare clausum fregit*, to that parcel or tract of land situate in the town of Owen Sound, containing by admeasurement thirty-five acres, more or less, being composed of the mill site on the river Sydenham, in the said town of Owen Sound, and may be otherwise known as follows : commencing on the top of the northerly bank of the river Sydenham, at the intersection thereof with the westerly limit of Poulet street, in the said town; thence north eight degrees fifteen minutes

west twelve chains, more or less, to Campbell street; thence south eighty-two degrees forty-five minutes west, crossing the said river to its westerly edge, five chains, more or less; then north westerly along the edge of the river down stream to Mill street; then south eighty-two degrees forty-five minutes west along the southern limit of Mill street, eight chains, more or less, to the north-west angle of the said mill site ground; then south four degrees west ten chains eighty links, more or less, to the allowance for road between park lots numbers 6 and 5; then north eighty-two degrees forty-five minutes east one chain seventy links, more or less, to the top of the bank of the river; then south easterly along the top of the bank to the limit between park lots numbers five and four; then southerly to the southerly limit of the town plot or park lot number one, keeping, in all places, at such a distance inland from the river as will allow of thirteen feet head of water being raised at the mill without encroaching on other property; then north eighty-two degrees forty-five minutes east, along the said southern limit of the town plot or park lot number one, and recrossing the river, seven chains, more or less, to a point to which the water will be backed by thirteen feet as before mentioned being raised at the mill; then northwardly, eastwardly, and north westwardly, keeping always, as on the other side of the river, at such a distance inland therefrom as ensures to the mill owner the privilege of raising thirteen feet head of water as aforesaid, to the place of beginning; saving and excepting the following lots of land, parcel of the said described premises, that is to say, lots numbers one and two on the north side of Albert street, numbers one, two, three, and four, on the south side of Albert street, and numbers twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine and thirty, on the west side of Poulet street which said twelve lots are parts and parcel of a certain part of the said mill site or reserve, which has been divided and laid out into town lots, which division of the said part of the said mill reserve will appear by

reference to a diagram or map of the same, drawn by Archibald McNab, Provincial Land Surveyor.

Pleas.—1. Not guilty. 2. Land not the land of plaintiff, as alleged. 3. That at the time of the alleged trespasses, that portion of the land mentioned in which the said alleged trespasses were committed was the freehold of the defendant

The plaintiff joined issue on the first and second pleas, and replied to the third plea, that the portion of land in the first and second counts of the declaration mentioned, in which the trespasses were committed, was not the freehold of defendant, as alleged. On this replication issue was joined.

The cause was tried before Hagarty, C. J., C. P., at the last Spring Assizes, at Owen Sound, and a verdict rendered for defendant.

It appeared that there had been disputes for seventeen or eighteen years as to the boundary of the land covered by the deed for the mill site.

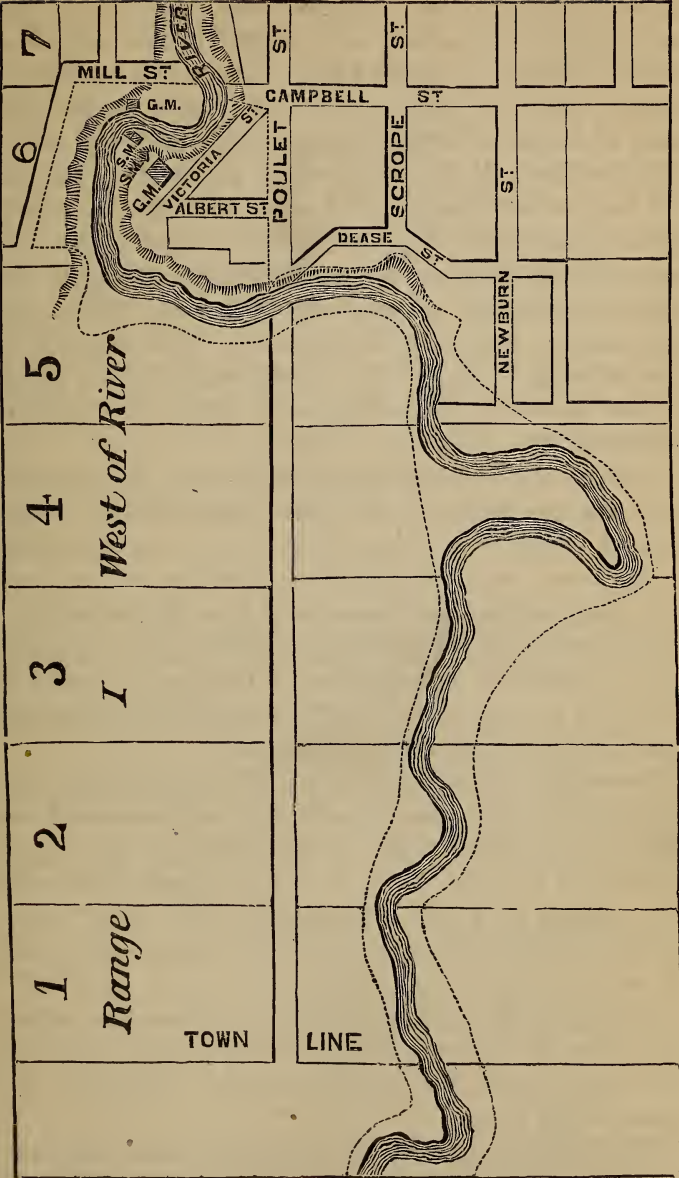
The government patent of the mill site was put in. It was dated the 9th of February, 1852, and conveyed to John Frost in fee the mill site. The description was substantially the same as that set out in the declaration; but the exceptions contained in the latter part of the declaration, as to the town lots, were not contained in the government patent.

It seemed to have been admitted at the trial, that the trespass was committed on the west side of the river, on that part of park lot number five between Poulet street and the river; and if the plaintiff's land, or the mill site, which it was admitted he owned, was, in that part of the river and lot, bounded by the top of the bank, then the verdict was to be entered for the plaintiff, but if the plaintiff's land only reached sufficiently high up the bank there to cover a height of water of thirteen feet at the dam, then the verdict for the defendant was to stand.

A plan of the locality appears on the next page.

Another government patent, dated 14th February, 1852, to John Frost, probably the same person to whom the other patent was made, for park lots numbers four and

NORTH.



five, in the first range west of the river, in the town of Sydenham, was put in. The land was described as commencing where a post has been planted, in the north west angle of park lot number five, then north eighty-two degrees forty-five minutes east nine chains thirty links, more or less, to the water's edge of the mill dam in the mill site block, in the said town, as aforesaid, by thirteen feet head of water being raised at the mill, then southerly following the water's edge, thus formed, to the limit between park lots numbers four and three; then south eighty-two degrees forty-five minutes west, thirty-one chains fifty links, more or less, to the allowance for road between the first and second ranges; then north seven degrees fifteen minutes west, ten chains, more or less, to the place of beginning.

A notice of sale of mill sites by the Crown Lands Department was put in, dated 3rd June, 1846, offering for sale, amongst others: 1st. The mill site on the river Sydenham, in the town plot of Sydenham, consisting of the block lying south of Campbell street, and west of Poulet street, with so much of the park lots numbers one, two, three, four, five and six, on both sides of the river, as would be flooded by raising ten feet head at the mill site, containing about thirty-five acres, upset price £20.

The evidence shewed that when the course in the first patent north eighty-two degrees forty-five minutes east, one chain seventy links, more or less, called for the top of the bank of the river, there was a well defined bank; that the distance by actual measurement now would take it over the bank to within five feet of the water, though then the water might not be at thirteen feet in the dam.

But Mr. Rankin, the gentleman who made this survey, stated that he knew the place in a state of nature, and that the original bank had slid, more or less, within the last twenty-eight years.

This witness surveyed the town plot, and after surveying the town plot he made the description of the mill site. He said he made the one chain seventy links to the

top of the bank, as it then was, to just where the bank began to break, and he shewed the bank in the plan.

He said also, "You can follow the bank to the limit between four and five, then you have to go to the thirteen feet head limit."

The surveyor called for the plaintiff said, "I followed the top of the bank all round till I came to the water mark of thirteen feet head, on the limits between four and five; then the bank seems to die away and becomes a flat, and the water spreads; then the course is to follow the thirteen feet head, where there are no natural land marks.

The defendant's counsel contended, that the thirteen feet head was the governing line all around the river, and,—as it was admitted that the plaintiff's case depended on this line being the top of the bank and not the line of the thirteen feet head,—that the decision of the Court of Appeals in the former case of *Frost v. Harrison* (a) must govern.

(a) The decision in the Common Pleas has not been reported. In that case the present defendant with others sued the present plaintiff for trespass to lot nine, on the south side of Dease Street, in the town of Owen Sound, in the County of Grey, being portion of broken lot number five, south of Dease Street, and east of the river.

The defendant pleaded, 1. Not guilty. 2. Lands not the plaintiff's. 3. That at the time of the alleged trespasses that portion of the land in the declaration mentioned in which the said alleged trespasses were committed, formed a portion of the land known as the Mill Site, on the river Sydenham, in the town of Owen Sound, which mill site may be otherwise known and described as follows, &c., (setting out the description as in the patent of the 9th of February) which mill site was the freehold of the defendant.

The cause was tried at the Spring Assizes at Owen Sound, in 1872, before Gwynne, J., without a jury, when a verdict for \$10 was rendered for the Plaintiffs, with leave reserved to move to enter a verdict for defendant.

The plaintiff claimed under letters patent from the Crown to A. M. Stephens, which were put in, dated 14th February, 1852, for park lot 5, on the south side of Dease street and east of the river, described as follows:—"Commencing where a post has been planted at the south-east angle of the said lot, then south eighty-two degrees forty-five minutes west five chains, more or less, to the water's edge of the mill dam, in the Mill Site Block, in the said town as formed by thirteen feet head of water being raised at the mill, then northerly following the water's edge so formed to Dease Street, then easterly along the southern limit of Dease street to where a post has been planted at the north-east angle of the said park lot, then south seven degrees fifteen minutes east nine chains, more or

At the conclusion of the case it was agreed, that as the impression of the learned Chief Justice was against the plaintiff as to the effect of the decision of the Court of Appeal, a verdict should be rendered for the defendant, with leave to the plaintiff to move to enter a verdict for him for \$9, and full costs, if the Court should think the description was to follow the top of the bank.

In Easter term last *O'Brien* obtained a rule *nisi* to set aside the verdict for defendant and to enter a verdict for the plaintiff, pursuant to leave reserved, for \$9, and full costs, on the ground that the land of the plaintiff, described in the pleadings, was bounded at the place where the trespass was committed by the top of the bank, and not by the line described by the water's edge when raised at the mill-dam to a height of thirteen feet; and on grounds stated at the trial, and for misdirection.

During the term *Frost* shewed cause.

The case between the same parties in the Court of Appeals settles the point that the top of the bank is *falsa*

less, to the place of beginning." The defendant claimed under the patent of the 9th of February, 1852. It was admitted that unless the description of the letters patent for the mill site, under which defendant claimed, gave him up to the *top of the bank* at lot No. 9, although thirteen feet of water at the mill dam would not raise the water to that height, or near it, the plaintiff was entitled to a verdict.

The question, as stated by the learned Judge, was "whether, as defendant contends, the letters patent, under which he claims, do not extend the mill site lot to the *top of the bank*, where it crosses lot 9. The plaintiff's contention is that the mill site lot only extends to the line where thirteen feet of water at the dam would raise the water on lot nine, which would be much below the top of the bank, where it crosses lot nine. The question is simply a question of construction of the letters patent, under which each claims respectively."

A verdict was taken for plaintiffs, and \$10 damages, with leave to defendant to move to enter the verdict for him.

In Easter Term, 1872, *Harrison*, Q. C., for defendant, obtained a rule *nisi* pursuant to the leave reserved, on the ground that the land of the defendant, called the Mill Site, on the river Sydenham, and described in the pleadings, is bounded as to the locality where the trespasses in the declaration mentioned are alleged to have been committed by the top of the bank, and not by thirteen feet head of water being raised at

demonstratio, and that the level of the water with a thirteen feet head at the dam is the limit of the plaintiff's land. The latter is a definite description, the former an uncertain one, and the latter must therefore govern. The top of the bank here may mean the water's edge, to make it reconcilable with the other deeds, and the main object of the grant was a head of thirteen feet of water in the mill-dam. The dates of the two deeds are so near together that both may be looked at, and ought to be construed together. In *Parker et ux. v. Elliott*, 1 C. P. 470, it was held that the top of the bank meant high-water mark. He also cited *Throop v. Cobourg &c., R. W. Co.*, 5 C. P. 509; *Stone v. Augusta*, 46 Maine 127, 137, 138; *Clark et al. v. Bonnycastle*, 3 O. S. 528; *Hagarty v. Britton*, 30 U. C. R. 321. As to a definite description governing: *McCullum v. Wilson et al.*, 17 U. C. R. 572; *Doe dem Murray v. Smith*, 5 U. C. R. 225; *Dohn v. Tice*, 11 C. P. 289; *Corporation of the County of Welland v. The Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 143; *Doe Hiscock v. Hiscock*, Tudor's L. C. on R. P. 830. The Crown could not intend to grant and would not have granted more than is requisite for the mill privilege, that is, up to the thirteen feet level.

the mill dam on the said mill site property; and on grounds stated at the trial.

During the same Term *A. Frost* shewed cause, and *R. A. Harrison, Q.C.*, supported the rule.

In the vacation after Easter Term the Court delivered judgment, discharging the rule *Nisi*, as follows:

GWYNNE, J.—We do not express any opinion as to what may be the proper construction as to the place on the ground indicated by the words, the “top of the bank of the river,” in the Letters Patent, under which the defendant claims for upon that side of the river, upon which the plaintiffs' land is situate. We are clearly of opinion that, throughout, the line bounding the defendant's property is a line along the margin of the water, as it would be if raised by thirteen feet height at the dam. The rule must therefore be discharged.

The defendant appealed from this judgment, and the case was argued in the Court of Appeal on the 7th January, 1873, by *Harrison, Q.C.*, for the appellants, and *M. C. Cameron, Q.C.*, for respondents. *Present*, Draper, C. J., of Appeal; Richards, C. J., Spragge, C., Hagarty, C.J., C.P., Wilson, J., Gwynne, J., Strong, V.C., and Blake, V.C.

At the close of the argument the appeal was dismissed with costs.

McFayden, contra. Where the line reaches the top of the bank, it is thirty-three feet from the water to the top of the bank. At the limit between lots four and five the bank fades away into a flat, and then it becomes necessary to fix the boundary of the property by the height the water would require to flow to raise the head of thirteen feet. Before that the physical objects furnished a much better boundary, and the thirteen feet head only becomes necessary as you advance beyond the limit between park lots four and five. There is no necessity for any strained construction, and the description itself must govern. The patent under which the defendant claims is of a subsequent date to that under which the plaintiff makes title, and the first deed must prevail. He cited *Howard et al v. Ingersoll*, 13 How. 381, 417; *Kains v. Turville*, 32 U. C. R. 17.

RICHARDS, C. J., delivered the judgment of the court.

The ground on which the judgment went, in the case between these parties that was carried to the Court of Appeals, as I understand the matter, was, that the description of the land in the deed, after the line crosses the river, viz., "then northwardly, eastwardly, and north-westwardly, keeping always, as on the other side of the river, at such distance, inland therefrom, as ensures to the mill owner the privilege of raising thirteen feet head of water as aforesaid, to the place of beginning," did not carry the line of the mill reserve higher up the bank on that side, before it arrived opposite to the place of beginning, than was necessary to raise the thirteen feet head of water.

The defendant in that action contended, that because the deed, on that side of the river, began at a point on the top of the northerly bank of the river, therefore the course when returning to the place of beginning, must go to the top of the bank wherever that might be on the same side of the river, where there was a high bank; or how could it get to the place of beginning.

Some of the Judges of the Court of Appeals, if not all

of them, thought that the line might continue on the course on which it had last been described at the distance to provide the height of water in the deed mentioned, until it arrived opposite the place of beginning; and it might then go to the place of beginning from that point, quite as well as to leap up to that elevation from a point much higher up the stream.

The plaintiff contended in that action, as he now contends as the defendant in this action, that the point which would give the 13 feet head of water in the dam, was the highest to which the defendant in that action could claim that his land went.

As the alleged trespass in that action was committed on the side of the river where the land of the grant, by the description already quoted, only goes to the distance from the water's edge necessary to get the thirteen feet head of water, and as the trespass was above that point, the Court of Appeals thought that the description in the deed of the land on that side did not give it to the defendant in that action; and in that view they confirmed the judgment in the Court below.

But here, by the very words of the description, which clearly corresponds with the physical objects on the ground, the land covered by the patent extends to the top of the bank, and continues following that bank of the stream against its current, to a point beyond the place where this trespass was committed.

There is no reason for suggesting that the words, "top of the bank," is *falsa demonstratio* there. The mill reserve is not shewn on any plan, or on any survey actually made, to be any different, as to the point in question, from what is contended for by the plaintiff.

The description giving the mill proprietor to the top of the bank, when there was a steep, well-defined bank, as appears to have been the case here, was a very natural one; and then, when the bank dropped down, to make the thirteen feet head of water the limit was, on the whole

probably, a very convenient way of making out the description so as to give the mill owner what he required.

The face of the bank itself, the top of which is said to have been about thirty feet above the water, would be an ample protection to the mill owner, as far as it went, and the remaining part of the description would cover what was absolutely necessary to give the protection to the residue.

The awkward part of the description is, that the last course did not go to the top of the bank, on that side of the river, as soon as the line drawn to embrace the thirteen feet head of water reached the high bank on that side of the river.

I see no reason why we should consider that the grant of the 14th of February should control that of the 9th. They were apparently both made to the same person, and all the interests then would be vested in the same person.

If the defendant has himself conveyed to this plaintiff the land in question, by the description mentioned in the declaration, there is no reason why the grant of the 14th February should qualify his own deed. He could give the plaintiff all he now claims, and even more; and if he has made such a deed, and I suppose he must have done so, or it would not be admitted, the plaintiff was entitled to recover if that description carried the mill-site land to the top of the bank.

The description in the advertisement of sale cannot govern, for that evidently does not shew the actual sale that was made, for that only provides for a head of water of ten feet, while the grant gives one of thirteen feet.

We must ask ourselves, what land did this patent grant after it had passed the great seal (a).

Whilst we might look at other deeds to see what was meant by certain words, as in the case of *Clark et al. v. Bonnycastle*, 3 O. S. 528; here there is no uncertainty in the words of the deed; they convey a clear meaning applicable to the condition of things on the ground in the locality in which the deed is to operate.

(a) See *Davis v. McPherson*, 33 U. C. R. 376.

The words "keeping always, *as on the other side of the river*, at such a distance inland therefrom as ensures to the mill owner the privilege of thirteen feet of water as aforesaid," are sufficiently answered by the fact, that for at least four-fifths of the whole distance, on that side of the river, the boundary is by the line of the thirteen feet head of water. I do not think we can use these words to limit the express description of the top of the bank on that side of the river to the thirteen feet line, nor to raise that line to the top of the bank before it arrives at the place of beginning.

We think the rule should be absolute to enter the verdict for the plaintiff, for nine dollars, with costs of suit.

Rule absolute.

CAMERON V. HUNTER ET AL.

Pleading—Trespass—Removal of house—Estoppel.

Declaration,, for entering plaintiff's land and also plaintiff's dwelling house thereon, and removing the house therefrom and converting it to defendant's use.

Plea, to so much of the count as refers to the dwelling house, that before plaintiff became possessed and owner of the lot, defendants placed the said dwelling house thereon, so that it might thereafter be removed by them, not affixing it to the land, and defendants afterwards, and while the land was unenclosed and used as a common, and the house open and unoccupied, in the day time, peacefully entered the lot and removed the dwelling house, the same being their property, and placed it on their own land, which are part of the trespasses complained of.

Replication, that defendants should not be allowed to plead said plea, because they were entitled to an interest in said land and built the house on the land and occupied it, and afterwards, and before the trespasses, &c., by deed conveyed the land, with the appurtenances, to A., who conveyed to plaintiffs.

Held—plea bad, as shewing no justification for the trespass admitted. facts alleged as to the house did not justify.

Held—replication good, by way of estoppel.

DEMURRER—Declaration : First count, trespass for breaking and entering lot number forty-two, in the first conces-

sion of Kincardine, the land of the plaintiff, depasturing same, &c., and also for breaking and entering the dwelling house of the plaintiff on the said close, and breaking down and destroying it, and removing and carrying it away off and from the close, and converting and disposing of it to the defendants' own use.

Third plea, to so much of the first count as refers to the dwelling house: that before the plaintiff became possessed of and the owner of the lot, the defendants had placed on the lot the said dwelling house, and did not affix it to the land, but placed it there so that it might thereafter be removed by them and placed on the lands of the defendants; and the defendants afterwards, and whilst the lot was uninclosed, without fences, and used as a common, and the dwelling house open and unoccupied, in the day time, peacefully, and quietly, and without force and violence, went in and upon the lot, and gently, peaceably, and without force and violence, and in the day time, removed and carried away the dwelling house, (the same being their property), and placed it on their own land—which are part of the trespasses in the first count alleged.

Replication to the third plea: that defendants ought not to be admitted to plead the said plea, because the defendants lived on and were entitled to an interest in and title to the said land and premises in the first count mentioned; William Hunter as one of the heirs-at-law of James Hunter, who was then dead, and who, at his death, was the owner in fee of the land and premises, subject to a mortgage then thereon, and Jane Hunter, as the widow of James Hunter, and entitled to her dower of the said land: that defendants built the dwelling house on the land and occupied it, and afterwards, and before the trespasses complained of, by deed, on, &c., made between them and one John Hunter, did thereby grant, release, and quit claim unto John Hunter, his heirs and assigns, all their estate, &c., both at law and in equity, of and in the land and premises, together with the appurtenances thereunto belonging and appertaining; that afterwards

John Hunter, by deed made in pursuance of the Act respecting short forms of conveyances, between him and one William McKay, did grant unto William McKay, his heirs and assigns, the land and premises, and the dwelling house part and parcel thereof; that afterwards William McKay, by deed made in pursuance of the said Act, between him and the plaintiff, did grant to the plaintiff, his heirs and assigns, the land and premises, and the dwelling house part and parcel thereto; that all these conveyances were made before the committing of the trespasses complained of; and during all that time the defendants were living in and on the dwelling house, land and premises—wherefore, &c.

Demurrer to the replication to the third plea, on the grounds, among others, that it contained no matter in law to estop the defendants from averring the truth of the matters in their plea; that the matters alleged by way of estoppel do not appear to have taken place between the parties to this suit, or their privies.

Joinder in demurrer, and notice of exceptions to the third plea; that no facts are disclosed which would justify the defendants in breaking and entering the plaintiff's close; that the facts and circumstances under which the house was placed on the plaintiff's land are not set forth; that for all that appears by the plea, the house may in law and in fact have been affixed to the freehold or land, and the plaintiff may have become the owner of the land with the knowledge of that fact, and on the faith that such was the case; that it is not alleged that the plaintiff had notice or was aware of the facts and circumstances under which the house was erected on the land by the defendants; that for all that appears by the plea the defendants may have so dealt with the house, and so have allowed the defendant to have become the owner of the land, without notice of their alleged claim to it, as to prevent them from now setting up the facts set out in the plea as an answer to the cause of action.

Robinson, Q. C., for the defendants. If the plea necessarily disclose a trespass committed by the defendants to the plaintiff's close, it may be difficult to sustain it. But the breaking and entering the close are not pleaded to; the defendants assume to justify only the removal of the house, although they do say that in order to effect the removal they entered upon the land. If the matters are severable, judgment may be for the plaintiff for the entry on the land, and for the defendants as to the removal of the house. The taking of the house is no doubt the substantial matter of dispute, and the defendants should not lose it if it be really their property. The plea is in substance a denial that the house was the plaintiff's. The replication cannot apply at all if the house be not a fixture, and the plea alleges it was not, but a chattel. He referred to *Addison* on Torts, 4th ed. 310; *Penton v. Robart*, 2 East 88; *Williams v. Morris*, 8 M. & W. 488; *Patrick v. Colerick*, 3 M. & W. 483; B. & L. Prec., 3rd ed., 420; *Taylor v. Cole*, 3 T. R. 292, 1 Smith's L. C., 6th ed., 115; *Pritchard v. Long*, 9 M. & W., 666.

S. Richards, Q. C., contra. The first count of the declaration alleges that the house was the property of the plaintiff, and was on his land, and that is the same as saying it was a fixture. The defendants say the house was theirs and it was not a fixture, and that it was theirs when they removed it. If that were so, they had no right to commit a trespass on the plaintiff's land to effect the removal: *Patrick v. Colerick*, 3 M. & W. 483; *Anthony v. Haney*, 8 Bing. 186. But the replication shews the defendants cannot, after having sold the land and house upon it, under which sale the plaintiff has derived his title, now set up an interest in and ownership of the house adversely to their own grant: *Bunnell v. Tupper*, 10 U. C. R. 414; *Bald v. Hagar*, 9 C. P. 382; *Sherboneau v. Beaver Mutual Fire Ins. Co.*, 30 U. C. R. 472 (a); *Darlington v. Pritchard*, 4 M. & G. 783.

(a) See the same case in Appeal, 33 U. C. R. 1.

WILSON, J., delivered the judgment of the Court.

The right of removal of fixtures in the case of landlord and tenant, it is universally admitted may be exercised by the tenant at any time during his term : *Lyde v. Russell*, 1 B. & Ad. 394 ; *Heap v. Barton*, 12 C. B. 274.

When there is a contract that the tenant may remove them at the expiration of the term, he is allowed a reasonable time after its determination within which to do so : *Stansfeld v. Mayor, Aldermen, &c., of Portsmouth*, 4 C. B. N. S. 120 ; *Sumner v. Bromilow*, 34 L. J. Q. B. 130, 11 Jur. N. S., 481.

In the case of a tenancy at will, the tenant has a reasonable time after the landlord has put an end to the will within which to remove his fixtures, although there was no agreement respecting the removal ; which would seem reasonable, as in the case of emblements.

And perhaps the tenant has the right to remove his fixtures after the end of his term, and during the continuance of his possession, so long as he holds under a right still to consider himself as a tenant : *Weeton v. Woodcock*, 7 M. & W. 14 ; *Roffey v. Henderson*, 17 Q. B. 574 : although it is said, it is not easy to understand what is the exact meaning of this rule : *Leader v. Homewood*, 5 C. B. N. S. 553, per Willes, J.

I refer also generally on this subject to *Pugh v. Norton*, L. R. 8 Eq. 626.

In *Penton v. Robart*, 2 East 88, Lord Kenyon was of opinion the tenant had the right of removal at any time while he still continued in possession.

The defendants do not bring their case within any of these rules. They say that they entered on the land while it was unclosed, without fences, and used as a common, and the dwelling house open and unoccupied, and removed it.

The exceptions to the plea do not plainly attack the plea in this respect ; but it is apparent the defendants had not continued their possession, and nothing is shewn from which it can be inferred that they had any reason to consider themselves as tenants or persons entitled to remove the house at the time they did so.

The defendants shew nothing more than that they placed the house on the lot, so that it might thereafter be removed by them to their own lands. They shew no possession or occupancy of the land on which they placed the house, nor any right or title to the land or to the possession of it.

And if they voluntarily erect a dwelling house upon another person's land, they may have the right of removing it, but it can only be while they still keep possession of the house, and not one instant beyond it, because they are wrongdoers, voluntary trespassers, and have no right to claim any of the privileges of a tenant or even of an occupier of the land.

According to the plea the defendants may have entered months or years after the time they put up and left the house on the land.

The plea should, as in *Penton v. Robart*, 2 East 88, have said nothing as to the entry upon the lot.

It does not profess to justify the entry into the land, for it is confined to the charge in respect only of the dwelling house, and in that respect it is free from the objection in *Fletcher v. Marillier*, 9 A. & E. 457, where seizing goods was pleaded to, and justified also along with the breaking and entering, and the part as to the goods was held to be objectionable because wrongly coupled with the entry.

I am not satisfied this plea is bad merely because it does shew an entry on the lot to take the house, when it is not pleaded to the land at all.

It may be read in this manner. As to the dwelling house, true it is the defendants entered on the land to take it, but they do not plead to nor justify the same; and for a plea to the same dwelling house they say they built it on the land, &c. This would have entitled the plaintiff to have signed judgment on the confession pleaded if the fact had not been denied by some other plea.

The cases shew that if the plaintiff put the goods of another on the plaintiff's land against the will of the other, that the owner may enter on the plaintiff's land to retake them: *Patrick v. Colerick*, 3 M. & W. 483.

Or that the owner of goods feloniously stolen may enter on the land of another where they are to retake them : 3 *Bl. Com.* 5 ; *Wilton v. Edwards*, 6 C. & P. 677.

Or where there is a sale by or for the occupier of the land, and leave is given by or for him to the purchaser to enter on his land and remove the goods : *Wood v. Manley*, 11 A. & E. 34.

Or when fruit, for instance, falls accidentally from the owner's tree into another's ground, the owner of the fruit may enter to take it : Per Tindal, C. J. in *Anthony v. Haney*, 8 Bing. at p. 192.

Or when goods have been fraudulently removed to another's premises to avoid a distress, the landlord may follow them : *Williams v. Roberts*, 7 Ex. 618.

Or to seize the goods of a third person under an execution which are on another's land : *Carnaby v. Welby*, 8 A. & E. 872 ; *Fletcher v. Marillier*, 9 A. & E., per Lord Denman, at p. 461.

Or to replace goods on one's premises who has wrongfully placed them on the premises of another : *Rea v. Sheward*, 2 M. & W. 424.

It is doubtful whether one has the power to enter the premises of another to view a horse he believes to be his, and which had been recently stolen : *Webb v. Beavan*, 6 M. & G. 1055.

And it is doubtful if the husband have power to enter the house of another to reclaim his wife : *Lewis v. Pontford*, 8 C. & P. 687.

The house was *primâ facie* part of the freehold : *Bunnell v. Tupper*, 10 U. C. R. 414 ; *Burling v. Read*, 11 Q. B. 904. See also *Lane v. Dixon*, 3 C. B. 776 ; *Blades v. Higgs*, 10 C. B. N. S. 713.

The general right to enter another's land to take one's own goods cannot be maintained. The circumstances justifying the entry must always be set forth : *Anthony v. Haneys*, 8 Bing. 186.

There is no authority to enter the premises of an execution debtor whose goods have been sold on his premises

vested in the purchaser, after the sale, in order to take the goods he has bought: *Williams v. Morris*, 8 M. & W. 488.

The plea cannot be sustained.

The replication must be a good estoppel against the claim of the defendants, from the authorities before mentioned. They sold the land in question with the house upon it, reserving nothing. The house passed with the land. If it did not, it was for them to shew all necessary facts from which it might plainly appear it did not, but that it was a mere chattel at the time of the sale, and was so treated by both parties.

And as the plaintiff claims under the deed of the defendants, he is in such privity of estate with them as to estop them from pleading the plea in question.

The replication is good in law.

The plaintiff is entitled to judgment on the demurrer to their replication, and for the insufficiency of the plea.

Judgment for plaintiff.

Re PECK AND THE CORPORATION OF THE COUNTY OF
PETERBOROUGH.

34 *Vic. ch.* 43—35 *Vic. ch.* 69—*R. W. Bonus—Mandamus to submit by-law—Demand and refusal.*

Before the Court will grant a mandamus to a Municipal Corporation to pass or submit a by-law to the electors granting a railway bonus, a distinct demand upon and refusal by the corporation to pass or submit the by-law must be shown.

P., a member of defendants' Council, presented a petition for a by-law granting such a bonus, on the 20th of June, and on the 21st the committee to which it was referred reported favorably, adding that they had a legal opinion going to shew that it was imperative on them to submit the by-law. The Council refused to adopt this report, and on the same day P. moved that a by-law in accordance with the petition be then read a first time, which was lost, but it did not appear that the by-law was drawn up or presented to the Council, and it was not before the Court. On the 25th P. applied for a mandamus.

Held, not a sufficient demand and refusal; for the Council were not bound to adopt the report, or assent to the legal opinion embodied in it, or to pass the motion for the first reading of a by-law not before them, and they were entitled to some time to consider the nature of the by-law they were required to pass and submit; and *Seemle*, they should have had reasonable notice of the intention to make this application.

During this term *M. C. Cameron*, Q. C., obtained a rule *nisi*, calling upon the corporation to shew cause why they should not pass and submit a by-law, to be voted upon by the ratepayers and duly qualified voters of the united townships of Galway and Cavendish; the united townships of Snowdon and Glamorgan; the united townships of Dysart, Guilford, Dudley, Harburn, Harcourt and Bruton; the townships of Minden and Stanhope; Monmouth, one of the united townships of Burleigh, Anstruther, Chandos, Cardiff and Monmouth, in the said county, pursuant to the Municipal Institutions Act, and amendments thereto, and which are applicable to the creation of debts, to aid and assist by way of bonus in the construction of the Lindsay, Fenelon Falls and Ottawa River Railway, and all other Acts having reference to the granting of such aid, as prayed for by Alexander McDonell, the said Peck, and other persons, in their petition presented to the said Council of the 20th of June last, and to do all

other acts, &c., which may be necessary to the submission of the said by-law forthwith; and why the said corporation should not pay the costs of this application; and why a mandamus should not be issued, directed to the Council of the corporation requiring it to pass and submit such by-law to be voted upon, &c., for the sum of \$45,000.

The application was based on the affidavit of the applicant Peck, who stated that he presented a petition, a copy of which was annexed to his affidavit, to the council of the corporation on the 20th of June, 1872, for the submission of a by-law to the portion of the county consisting of the municipalities in question, to aid the railway mentioned, under 35 Vic. ch. 60: that the petition was referred to a committee on the 21st of June, who reported that they had examined the petition and found it signed by more than the requisite number of freeholders, and also reported that they had a legal opinion which went to show that it was imperative on the council to submit the by-law, and recommended that the council should pass the two readings of a by-law to the extent of \$45,000; to be submitted to the electors of the various townships, &c.: that the council refused to adopt the report by a vote of twelve to six: that the applicant, being a member of council, introduced a motion, based on the report, to the effect, after reciting the petition of the ratepayers, &c., and its reference to a committee, &c., that a by-law for \$45,000, in accordance with the said petition, be *now* read a first time, which motion was lost on a division.

No copy of the intended by-law was filed, neither was there any affidavit to the effect that the signers of the petition were actual freeholders, &c., nor was there any affidavit shewing in what way the various municipalities, or any of them, were interested in the railway, or that the railway passed through or near any of the municipalities.

It appeared from the papers annexed to the affidavit that the petition was presented on the 20th June; on the 21st the committee reported, and apparently the same day

the motion was rejected to pass the motion for the first reading; and on the 25th June this application was commenced by a summons granted by a Judge in Chambers at Toronto, which was afterwards was enlarged till term.

In Michaelmas Term, 1872, *J. K. Kerr* shewed cause. The rule should have been for a mandamus, and is defective also, in that it does not disclose the grounds the motion is based on. [MORRISON, J.—The obligation is statutory, and it is not necessary to set out that ground.] The obligation of the statute is not invariable, and only arises in certain cases of default, or on certain conditions being complied with. [*M. C. Cameron* asked leave to amend and enlarge the motion till next term. *Kerr* abandoned the objection, and answered the motion on its merits.] It is not shewn that the railway would run in or near all the townships. All the townships are not interested, particularly Monmouth could not be. The affidavits do not shew the facts required by 34 Vic. ch. 43, sec. 19, and 35 Vic. ch. 60, sec. 5, that the petitioners were resident freeholders, or that the voters had the qualification required by 29–30 Vic. ch. 51, sec. 96; 31 Vic. ch. 30, sec. 46. The by-law is not before the Court, and it should be. The acts incorporating the railway, 34 Vic. ch. 43, and 35 Vic. ch. 60, are not imperative. It is the duty of the County Council to look into the whole matter, and see whether they ought to pledge the county's credit or not: *Rex v. Commissioners of Flockwood Inclosure*, 2 Chitty 251; *Rex v. Bailiff and Corporation of the Borough of Eye*, 2 D. & R. 172; *Rex v. Mayor, &c., of the Borough of West Looe*, 5 D. & R. 414; *Tapping on Mandamus*, 13; *Rex v. Justices of Middlesex*, 9 A. & E. 546, per *Littledale, J.* There had been no sufficient demand on the Council and refusal by them. Nothing is shewn except Peck's introduction of the measure and its being voted down. It may also be urged that Peck being a member of Council cannot apply against it, though in other respects qualified as a ratepayer to be heard here.

M. C. Cameron, Q. C.—This is not an application to

compel the defendants to finally pass a by-law, but to do what under the Act a certain number of persons may require them to do. It should be presumed that the petition is signed by the proper number, for the counsel for the applicant does not object to the motion on that ground. The objection is that a majority is hostile to this undertaking. It is open to the council, under sec. 19 of 34 Vic. ch. 43, to submit a by-law without being requested so to do by the ratepayers, but if requested by the requisite number they must submit it. 35 Vic. ch. 60, sec. 5 does not make it less imperative on the council. It provides that "such by-laws *shall* be submitted in manner following, namely," and then sets out the number who must petition in the case of the different municipalities. When the by-law has been voted on the council must pass it in six weeks thereafter. Peck is properly an applicant. He is a ratepayer, a reeve, a member of the council, and a resident of the county. As to any of the townships not being interested in the railway, there is not one but after the railway is built would be greatly benefited by it, and all are therefore interested. [RICHARDS, C. J.—Can "interested in" apply to any township through which the railway does not pass?] A sufficient refusal is proved: *King v. Directors of the East India Company*, 4 B. & A. 530.

MORRISON, J., delivered the judgment of the Court.

The Statute 34 Vic. ch. 43, sec. 19, O., (the act incorporating the Fenelon Falls Railway Company), provides that "it shall be further lawful for any municipality, which may be interested in securing the construction of the said railway, or through any part of which or near which the railway or works of the company shall pass or be situated, to aid and assist the said company by loaning, &c., * * : Provided always, that no such aid, * * * shall be given, except after the passing of by-laws for the purpose, and adoption of such by-laws by the ratepayers, &c., as provided in the Municipal Act for the creation of debts."

And by the 20th sec., as amended by 35 Vic. ch. 60, sec.

5, O., such by-law shall be submitted in the case before us, on the petition of fifty resident freeholders, who are duly qualified voters, &c.

It was objected that there was no affidavit shewing that the municipalities were interested in this railway; or that it ran through or near any of them; or that the petitioners were freeholders; the affidavit only referring to a copy of the petition.

It was also objected that no demand or refusal was shewn.

As to the last objection, no demand was in fact made, but the applicant relied on the circumstances set out in the affidavit as being sufficient, viz., that it appeared that the petition in question was presented to the council on the 20th June; that the same day it was referred to a committee to report on; that on the following day that committee reported favorably, and that a motion was made for the reading of the report, which, being carried, was read; that it was then moved it be adopted, which motion was lost.

With reference to that motion I can't say they were bound to adopt it or to assent to the legal opinion embodied in it.

It was then moved, on the same day, by this applicant, being a member of the council, that a by-law for \$45,000, in accordance with the petition, be then read a first time.

It does not appear that any by-law was presented to the council, but, as I take it, it was the reading of a by-law to be drawn up.

If drawn up, it is not before us, and it may have been of a character that they ought not to pass, and so we have no knowledge of what the council may have then refused to pass.

The applicant must shew by his affidavit that he has complied with all the requisite preliminary, &c., necessary to the obtaining of the writ. *Tapping on Mandamus*, 294.

No further demand was made upon the council, but on the 25th June this application was made to a Judge in Chambers to compel the council to pass a by-law,

The summons granted on such application was eventually enlarged till term, when this motion was made.

Can it be said that the council are not entitled to have some time to consider the nature of the by-law they are asked to pass and to submit to the ratepayers, or that upon the proceedings here shewn, and no further demand made upon them, or a by-law submitted to them, that they are subject to an application of this kind within two or three days after a petition has been presented to the council.

I think it would be most unreasonable if we were so to hold, unless there was a formal demand and an absolute refusal. And I am not prepared to say that the council should not be notified that if they refused to pass a proper by-law an application of this nature would be made; and that they should have a reasonable time to take the necessary steps,

The statute does not state after what time they are to pass such by-law, and submit it, and according to the usual rule adopted in such cases, they are entitled to a reasonable time.

The council refusing to adopt the report as presented was no refusal, as it contained matter which they were not bound to assent to; neither was it obligatory on them to adopt a motion for the passing of the first reading of a by-law not before them; and so I do not think that vote was equivalent to a refusal.

It seems to me that the promoters of the petition, before they made this application, should have made a distinct demand.

In *Rex v. Brecknock and Abergavenny Canal Co.*, 3 A. & E. 217, 222, Lord Denman, C. J., said: "We cannot grant a mandamus unless there has been a direct refusal; and here, I think, there has not. It is not indeed necessary that the word 'refuse,' or any equivalent to it, should be used; but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required. * * A direct application would probably have led to a direct denial; and that, or something equiv-

alent, should have taken place to furnish ground for a mandamus."

And Coleridge, J. said, at p. 224: "A mandamns ought not to be moved for unless the party alleged to be in fault has known distinctly what he was required to do, so as to exercise an option whether he would do it or not."

And in *Regina v. The Bristol and Exeter R. W. Co.*, 4 Q. B. 162, Lord Denman, C. J., said, at p. 170: "The meaning of what was said in *Rex v. Brecknock and Abergavenny Canal Co.*, 3 A. & E. 217, is that there must have been a distinct demand of that which the party moving desires to enforce."

And Patteson, J., said, at p. 171: "It is contended here, in effect, that no demand was necessary, because it was palpable that what the Act requires had not been done; but that argument would apply to all cases; and, if it prevailed, parties might come here for a mandamus, without having given the least notice of their objections."

We think on this ground the rule should be discharged with costs.

It is not necessary to consider the other objections raised.

Rule discharged.



PARSONS V. CRABB.

Pleading—Set-off—Replications—Statute of Limitations—Suing as executor or trustee—Assignment of debt.

Declaration on an agreement to pay \$450 by a promissory note, breach, non-payment. Sixth plea, set off, on two notes made by plaintiff, and endorsed to defendant.

Seventh plea, in substance: that the same set-off was pleaded by the defendant in a former action by plaintiff against him for the same causes of action as in this suit; and the plaintiff not having replied thereto, and defendant being in a position to sign judgment of *non pros* it was agreed that the plaintiff should pay defendant \$20 and costs in full settlement, and in case of non-payment that defendant should be at liberty to proceed for the recovery thereof in said suit; and that the plaintiff accepted said agreement in full satisfaction and discharge of plaintiff's claim. The plaintiff replied equitably, 2. That defendant waived the agreement by giving the plaintiff notice of his intention to enter judgment of *non pros* in said action for want of a replication, and accepting his costs of defence.

Held, replication bad, for by the agreement defendant was entitled to force the plaintiff on as he did.

The plaintiff also replied equitably, 3. That defendant was indebted to the plaintiff as executor for goods of the testator purchased on credit, and before the credit had expired or defendant had acquired the notes pleaded, as a set-off, the plaintiff and his co-executors assigned the testator's estate for the benefit of creditors, and plaintiff sued in the former action and sues in this only as a trustee for the estate.

Held, replication no answer, for the accord and satisfaction were not said to have been in fraud, or to the disadvantage of the trust, or to have been repudiated by the trustees.

To the sixth plea of set-off, the plaintiff replied, 2. The Statute of Limitations, 3. That the causes of action accrued to him as executor and that he sued for the estate only. 4. That before the suit he and his co-executors assigned &c., (as in the replication to the 7th plea.)

Held, that the third and fourth replications were not bad for departure; but were insufficient as not shewing a full and satisfactory ground for equitable relief against the legal set-off; and that the fourth replication was bad, for not shewing that the set-off had not accrued before the assignment of the debt sued for, or that defendant had any notice of the assignment.

The defendant rejoined in substance to the second replication to the seventh plea, that in the former suit the same subjects of demand and set-off were in dispute, that the former suit was commenced on the 6th Dec., 1862, and was kept pending until the plaintiff, on his own mere motion, discontinued it on the 8th Oct., 1868: that when the plaintiff commenced this suit on the 9th Oct., 1868, the Statute of Limitations had operated against the set-off; and that the defendant on the 15th March, 1869, and within a reasonable time, to wit, within one year, from the discontinuance of the former action, pleaded the said set-off in this action.

Held, that the rejoinder was good, for that in this Province a set-off, on which the defendant may recover a balance, is as much within the equity of the statute as an action for the same demand would be.

To the fourth rejoinder (above set out) to the second replication, of the Statute of Limitations, to the seventh plea, of set-off, the plaintiff sur-rejoined, 2. That the two notes were drawn and payable in the Province of Quebec, and by the law there the cause of action thereon became

extinguished after five years from the accruing thereof, and that such cause of action became extinguished pending the former action. *Held*, bad as a departure.

The plaintiff also surrejoined, 4. in the same terms as the third replication, adding the allegation that defendant knew the plaintiff was acting as executor when he sold the goods to the plaintiff. *Held*, not sufficient.

The fifth surrejoinder, on equitable grounds was, in substance : that before the former action, and before the term of credit on the sale of the goods expired, and before defendant acquired the set-off, the plaintiff and his co-executors assigned the testator's estate for the benefit of creditors, of all of which defendant had notice, and the plaintiff sued in the former action and sues in this for the estate only.

Held, bad for not alleging directly that defendant had notice of the premises before he acquired his set off.

The sixth surrejoinder was, that the plaintiff before the credit given to defendant on the sale of the goods to him had expired, and before defendant had acquired the notes, assigned his estate and effects to J. and M. in trust for his creditors, of which defendant had notice. *Held*, bad.

Held, that the fourth, fifth, and sixth surrejoinders were bad also as affording no appropriate or logical answer to the fourth rejoinder.

The plaintiff pleaded a third surrejoinder, (set out below), to the fourth rejoinder to the second replication to the seventh plea, there being no such rejoinder to the replication to the seventh, but one to the replication to the sixth plea. It was *Held*, bad.

DEMURRER.—The declaration on an agreement to pay \$450 by note, and broach non-payment ; and the sixth plea, a plea of set-off of two promissory notes made by plaintiff and endorsed to defendant, are set out in this case in 31 U. C. R. 435-436.

The seventh plea, added since the former argument, was as follows, on equitable grounds : That before the commencement of this suit, the now plaintiff commenced an action in this Court against the defendant, for the same identical causes of action in the declaration mentioned, and the parties in the said suit and this action are identical : that the defendant duly pleaded to said action a plea of set-off of the very same identical promissory notes that are in the said sixth plea in this cause mentioned : that the said promissory notes were at the commencement of said suit due and unpaid, and not barred by the statute of limitations : that the defendant, by a notice in writing endorsed on said plea, required the plaintiff to reply thereto in eight days, otherwise judgment : that the said plea and notice were duly filed and served within the time allowed by law for that purpose :

that the plaintiff did not reply to the said plea of set-off, but on the contrary thereof left the same unanswered, and admitted the same to be true in fact and good in law: that the said set-off of the defendant exceeded in amount the causes of action in the said declaration mentioned: that the defendant intended to have and would have signed judgment of *non pros* against the plaintiff in the said action for not replying to the said plea, as he might, and could, and would have done but for the agreement hereinafter mentioned: that thereupon, and long before the commencement of this suit, in consideration of the premises, and that the defendant would not sign such judgment of *non pros*, it was agreed to by and between the plaintiff and the defendant that the amount of the said two promissory notes should be set off and allowed by the defendant against the said causes of action in the declaration mentioned, except as to \$20: that the plaintiff should pay to the defendant the said sum of \$20 and the costs of said suit: that except as to the sum of \$20, the defendant should abandon and remit to the plaintiff the amount by which the said set-off exceeded plaintiff's claim: that in case the plaintiff failed to pay said costs, and said sum of \$20, the defendant should, if so advised, be at liberty to proceed for the recovery thereof in said suit; that thereupon the defendant did set off and allow against the said causes of action of the plaintiff the amount of the said two promissory notes, except the said sum of \$20, and abandoned and remitted to the plaintiff the whole amount of the said notes by which they exceeded in amount the said claim of the plaintiff, (except as to the said sum of \$20), and stayed and suspended proceedings in the said suit, except as to enforcing the payment of the said costs and to said \$20, which the plaintiff did not pay as agreed upon; and that the plaintiff accepted and received the said agreement so made as aforesaid from the defendant in full satisfaction and discharge of the plaintiff's claim in this action.

Replications to sixth plea, the same as set out in 31

U. C. R. 436, 437, viz: 2. Statute of Limitations; 3. That the cause of action accrued to plaintiff as executor, and and he sued as executor; 4. That the cause of action accrued to plaintiff as executor; that he had assigned to H. & M., and that he sued as trustee for H. & M.

Second replication to seventh plea, on equitable grounds: that the defendant waived and forfeited his rights under the alleged agreement set out in the said seventh plea, by giving to the plaintiff, before the discontinuance of the said former action and the commencement of this suit, namely, on the 30th of September, 1868, a notice in writing of his intention to proceed in the said former action by entering judgment of *non pros* against the plaintiff therein for want of a replication after the end of the term next ensuing such notice, and by accepting the costs of his defence of said former action taxed to him on the plaintiff's rule to discontinue the same.

Third replication, on equitable grounds, to the said seventh plea: that the causes of action on which he sued in the said former action, and on which he sues herein, accrued to him by reason of a contract in writing for the sale of goods which were of B. P. in his lifetime, since deceased, (of whose will the plaintiff was one of the executors), by the plaintiff to the defendant: that he, the plaintiff, sold the said goods to the defendant in the ordinary course of his duty as such executor; that the defendant then knew that he was acting in the matter as such executor; and that the plaintiff afterwards, and before the commencement of the said former action, and before the terms of credit given to the defendant on the sale of the said goods had expired, and also before the defendant had acquired the two promissory notes in the said seventh plea mentioned, assigned jointly with his co-executor and co-executrix all the estate and effects, rights and credits, which were of the said B. P. in his lifetime, in their hands to be administered, including the causes of action aforesaid to J. H., Jr., and T. M., in trust for the benefit of the creditors of the estate of the said late B. P., which assign-

ment was duly assented to by them, and of all which the defendant had notice ; and the plaintiff sued in the said former action, and now sues in this action, not for his own benefit, but for that of the said estate and as a trustee only.

Fourth rejoinder to the second replication, so far as the said replication relates to the promissory notes in the sixth plea mentioned, and the plaintiff's indebtedness on said notes : That after the accruing of the plaintiff's causes of action in the declaration mentioned, and while the defendant was the holder of the said promissory notes, and after each of the said notes was due and payable, the now plaintiff, on the 6th of December, 1862, sued and prosecuted out of this honorable Court a writ of summons against the now defendant, tested the day and year last aforesaid, in an action for the same causes of action as are in the declaration herein mentioned ; and while said writ was in full force caused a copy of the said writ to be served on the defendant, and the now defendant, within ten days after such service, caused an appearance to be entered for him in the said action, and on the 28th February, 1863, the now plaintiff filed a declaration and declared in the said action against the now defendant for and upon the same identical causes of action, and for the recovery of the same identical moneys, as are in the declaration in this cause mentioned ; and thereupon the now defendant, on the 4th day of March, in the year last aforesaid, pleaded to the said declaration in the said former action a plea of set-off of and upon the same identical promissory notes as are in the said sixth plea in this suit mentioned ; and the said plea of set-off in said former action alleged, as the fact was, that the plaintiff before and at the time of the commencement of the said former action was, and then at the time of the pleading of the said plea still was, indebted to the defendant upon the said notes in an amount greater than the plaintiff's claim in said action, and that the defendant claimed to recover a balance from the plaintiff ; and the said plea of set-off in said former action was so pleaded as aforesaid more than

four years before the expiration of six years from the time when either of the said promissory notes became due and payable, and said plea has ever since remained of record as one of the pleas of said former action; and the said former action was pending in this honorable Court, and the matters therein in dispute between the plaintiff and the defendant remained undisposed of, from the time the said plea of set-off was so pleaded until the 3rd day of October, 1868, being a period of over five years and a half, when the said plaintiff obtained and served on the defendant a rule in the said action to discontinue the said action; and thereupon, and after the expiration of six years from each of the respective times when said promissory notes respectively became due and payable, and without the default of the defendant, but solely by the mere motion of the plaintiff, such proceedings were had and taken by the said plaintiff in the said former action, and on the said rule, that on the 8th day of October aforesaid, in the year last aforesaid, the said former action became and was wholly discontinued and abandoned and put an end to by the plaintiff; and afterwards, on the 9th day of October aforesaid, in the year last aforesaid, being the next day after said former action was discontinued and put an end to as aforesaid, the plaintiff commenced this action, and the defendant duly appeared therein, and the plaintiff afterwards, on the 18th day of December, in the year last aforesaid, filed and served his said declaration herein for and upon the same identical causes of action, and to recover the same identical moneys as were mentioned and claimed in the said declaration in the said former action; and the defendant afterwards, on the 15th day of March, 1869, within a reasonable time from the time when said former action was discontinued, abandoned and put an end to as aforesaid, to wit., within one year therefrom, filed and pleaded in this action and to the said declaration herein the said sixth plea herein; and the plaintiff at the commencement of this suit, and at the time of the pleading of the said sixth plea herein, was and still is

indebted to the defendant upon the said notes in an amount greater than the plaintiff's claim in this action, and such indebtedness of the plaintiff is the same identical indebtedness as was mentioned and claimed in said plea of set-off in said former action.

Demurrer to third replication to sixth plea, stating the objections very fully.

They were, in substance, that the replication is a departure from the declaration, because the plaintiff has sued in his individual right, and he now sets up he is suing in his representative capacity of executor.

That having elected to sue as he has done, he cannot change his character as plaintiff.

That it is not shewn the defendant had notice or knowledge of the facts alleged.

That the plaintiff shews no equitable ground for relief against the plea of set-off.

That it does not shew the plaintiff can get the relief he claims at law.

That it does not shew the set-off did not accrue against the plaintiff as executor also.

That it makes no answer to the excess of the defendant's set-off above the amount of the plaintiff's demand.

Demurrer to fourth replication to sixth plea, stating the same objections, and further : that the replication does not shew that the assignment by the executors before the plaintiff became indebted to the defendant.

There were also demurrers to the second and third replications to the seventh plea on the grounds, as to the second replication to seventh plea : that an accord and satisfaction cannot be waived, and was not waived or forfeited by the matters alleged.

That the defendant having the power to sign judgment if the \$20 and costs were not paid, he had the right to give the said notice, and to do all things as therein alleged.

That the replication is neither a legal nor an equitable answer to the plea.

That it does not appear proceedings were had on the notice.

As to the third replication to seventh plea : That the assignment therein mentioned is no answer to the accord and satisfaction pleaded.

The replication does not shew the plaintiff had no authority to accept and receive the accord and satisfaction.

That it is a departure, for the reasons before stated.

That it does not shew the defendant had notice the plaintiff made the accord and satisfaction otherwise than in his individual right.

That the accord and satisfaction may have been in either right and yet bar the plaintiff.

And also stating all the reasons above given as objections to the third and fourth replications to the sixth plea.

Second surrejoinder to the fourth rejoinder, to the second replication : that as to the notes mentioned in the sixth plea : that the promissory notes mentioned in the said rejoinder were two promissory notes drawn and made payable at the City of Montreal, in the then Province of Lower Canada, now the Province of Quebec, in the Dominion of Canada, and were subject to the laws of that Province : that by the laws of that Province respecting simple contracts and the limitations of action thereon, the debt or cause of action on promissory notes becomes extinguished after the expiry of five years without suit from the accruing thereof : And the plaintiff says that the debt or causes of action on the said two promissory notes became extinguished pending the said former action, to wit., respectively, on the 10th of October, 1866, and the 10th of December, 1866, being after the alleged agreement in the seventh plea mentioned, and before the giving of the term's notice in the second replication to the said seventh plea mentioned, and also before the commencement of this suit.

Third surrejoinder on equitable grounds to the same rejoinder : That pending the said former action, and after the making of the alleged agreement in the said seventh plea mentioned, and after the debt or causes of action on the said two promissory notes would have become in the ordi-

nary course extinguished, as in the last surrejoinder is set out, the defendant, in breach of his said agreement with the plaintiff to set off the said notes against the plaintiff's claim, as in the said seventh plea mentioned, of his own motion forced the plaintiff either to go on in the said former action or to discontinue the same by giving the plaintiff a notice in writing of his intention to enter judgment of *non pros* against him, after the end of the term next ensuing such notice, for want of a replication: that the plaintiff elected to discontinue the same, and did so, and the defendant acquiesced therein and received from the plaintiff his costs of defence thereof without objection, whereby the said former action was stayed and discontinued in consequence of the defendant's own improper course of proceeding and breach of agreement; and it is inequitable now for the defendant to set up in the said fourth rejoinder the set-off of the said two promissory notes to this action, by reason of their having been pleaded in the said former action and pleaded herein within a reasonable time after the determination of the said former action, he, the defendant, having been the cause of the said former action having been discontinued, and having acquiesced in and consented to that course being taken by the plaintiff, and having accepted the costs of his defence thereof without objection.

Fourth surrejoinder on equitable grounds, to the said fourth rejoinder, that the causes of action on which he, the plaintiff, sued in the said former action, and on which he sues herein, accrued to him by reason of a contract in writing for the sale of goods which were of Benjamin Parsons in his lifetime, since deceased, (of whose will the plaintiff was one of the executors) by the plaintiff to the defendant: that he, the plaintiff, sold the said goods to the defendant in the ordinary course of his duty as such executor: that the defendant then knew that he was acting in the matter as such executor: that the said goods were assets of the estate of the said Benjamin Parsons in the hands of the plaintiff, after the death of the

said testator, and the money sued for in the said former action and this action will, if recovered herein, be also assets of the said estate; and that the said former action was, and this action is, brought by the plaintiff for the benefit of the said estate, and not for his own individual benefit, and that he has no interest therein.

Fifth surrejoinder, on equitable grounds, to the said fourth rejoinder: that the causes of action sued upon in the said former action, and now sued upon herein, accrued to the plaintiff as in the last pleading mentioned, and that the plaintiff, before the commencement of the said former action, and before the term of credit given to the defendant on the sale of the said goods mentioned had expired, and also before the defendant had acquired the said two promissory notes, assigned jointly with his co-executor and co-executrix, &c., all the estate and effects, rights, and credits, which were of the said Benjamin Parsons in his lifetime, in their hands to be administered, including the causes of action aforesaid, to John Haldan the younger, and Thomas Morland, in trust, for the benefit of the creditors of the said late Benjamin Parsons, which assignment was duly assented to by them, and of all which the defendant had notice; and the plaintiff sued in the said former action, and now sues herein, not for his own benefit, but for that of the said estate, and as a trustee only.

Sixth surrejoinder to the same rejoinder, on equitable grounds: that after the causes of action sued upon in the said former action, and now sued upon herein, had accrued to him, he, the plaintiff, before the commencement of the said former action, and before the term of credit given to the defendant on the sale of the said goods in the said fourth surrejoinder mentioned had expired, and also before the defendant had acquired the said two promissory notes, assigned all his estate and effects, rights and credits, to J. H., Jr., and T. M., in trust, for the benefit of his creditors, of all which the defendant had notice.

The defendant demurred to these five surrejoinders, and stated numerous objections to each one of them.

In this Term, *Harrison*, Q. C., argued the demurrers for the plaintiff.

Although the defendant has amended his pleadings as to the set-off, by alleging that he pleaded it in a reasonable time after the termination of the former action, so that it may be sufficient as it now is, the plaintiff is still entitled to succeed against it by reason of the answers he has made to it. It now appears the promissory notes relied on as a set-off cannot be alleged to be a debt, because, by the law of Quebec, where they were made, the debt is extinguished by the lapse of five years : *Hervey v. Jacques*, 20 U. C. R. 366 ; *Hervey v. Pridham*, 11 C. P. 329 ; *Sheriff v. Holcombe*, 13 C. P. 598, 2 E. & A. 516 ; *Darling v. Hitchcock*, 25 U. C. R. R. 463, 28 U. C. R. 439 ; *Harris v. Quine*, L. R. 4 Q. B. 653. The seventh plea added since the former argument is answered fully by the plaintiff's replications.

S. Richards, Q. C., contra. The fourth replication to the sixth plea is bad, because after the plaintiff has elected to sue in his own right he cannot allege in his replication or later pleadings that he is suing as an executor, or trustee, or otherwise, in a different character : *Wilson v. Gabriel*, 4 B. & S. 243. [RICHARDS, C. J.—Should we not stay proceedings : *Cocker v. Tempest*, 7 M. & W. 502.]

The replications to the seventh plea are bad. There is nothing shewn in them or in the later pleadings to do away with or vacate the accord and satisfaction set out in the plea. [WILSON, J., referred on the question of set off to *Sankey Brook Coal Co. v. Marsh et al.*, L. R. 6 Ex. 185.]

WILSON, J., delivered the judgment of the Court.

The whole of this vast mass of pleading turns upon the sixth and seventh pleas ; the sixth being a plea of set-off on two promissory notes, and the seventh, that the set-off was pleaded in a former action brought by the plaintiff for the same causes of action he now sues for, and it was agreed between them to settle all matters in that suit by the plaintiff paying \$20, and the costs of the suit ; and if

he did not, that the defendant should be at liberty to proceed for the same in the suit ; and that the plaintiff did not pay the same ; and that he accepted the said agreement from the defendant in full satisfaction and discharge of his claim.

The plaintiff to the seventh plea replies equitably : Secondly, that the defendant waived and forfeited the agreement by forcing the plaintiff to reply or suffer judgment, in consequence of which he had to discontinue and pay costs to the defendant ; and thirdly, that the defendant became indebted to plaintiff, as executor, for goods of the testator sold to defendant on a term of credit ; and before the credit expired, and before the defendant acquired the notes pleaded as a set-off, the plaintiff and his co-executors assigned all the estate of the testator to certain named persons in trust for the creditors of the estate ; and the plaintiff sued in the former action, and now sues, not for his own benefit, but for the benefit of the estate, and as a trustee only.

These replications are demurred to for various causes.

We are of opinion the second replication to the seventh plea is bad, because forcing the plaintiff to go on with the suit or suffer judgment was exactly what the parties had bargained for and agreed to. That fact was not stated in the former pleadings, when we decided against the defendant by reason of the waiver.

The third replication to the seventh plea was objected to, on the ground that it afforded no answer to the accord and satisfaction pleaded, and it did not shew the plaintiff had no authority to accept or receive the same. It was objected to also because it was a departure.

We hold the replication to be no kind of answer to the plea. The accord and satisfaction were made by and between the plaintiff, personally, and the defendant after the alleged assignment. It is not said to have been made in fraud of the trust. It may, on the contrary, have been greatly for the advantage of it to have made such a bargain. Nor is it shewn that the trustees have objected to or repudiated it, nor that the creditors or any interest whatever have been or are likely to be damnified by it.

In such a case it would be unreasonable to acquit the plaintiff from the agreement he has voluntarily entered into with the defendant.

It is not necessary to consider the ground of departure at present.

The defendant is entitled to judgment on the demurrers to the second and third replications to the seventh plea.

As to the sixth plea of set-off the plaintiff has replied : Secondly, the statute of limitations, that the causes of action did not accrue in six years.

Thirdly, that the causes of action accrued to the plaintiff as executor, and he sues for the estate only.

Fourthly, that the causes of action accrued to him as executor ; and before this suit he and his co-executors assigned the estate in trust for the creditors of the estate, and he sues as a trustee only.

The third and fourth replications are alike in principle.

The fourth rejoinder to the second replication of the statute of limitations to the plea of set-off is in effect, that in the former suit between these parties, the same subjects of demand and set-off were in litigation : that the former suit commenced on the 6th of December, 1862, and was kept pending until the plaintiff of his own mere motion discontinued it, on the 8th of October, 1868 ; that the plaintiff commenced this suit on the 9th of October, 1868, at a time when the Statute of Limitations had operated against the set-off ; and that the set-off which the defendant again pleaded in this action on the 15th of March, 1869, was within a reasonable time so pleaded after the former action was discontinued.

That rejoinder we held in the former action would have been a good answer on the equity of the statute. It was not, however, pleaded in that form ; it omitted the allegation of any proceeding having been taken upon the claim of set-off within a reasonable time after the discontinuance of the former suit, by an action being brought upon it, or by its having been pleaded as a set-off. That omission is now supplied, and we still

think that in this province a set-off in and on which the defendant is entitled to recover the full amount of his claim, however much in excess it may be of the plaintiff's demand, is as much within the equity of the statute as a new action by a plaintiff would be, and has been held to be ; because, in this province, the defendant in such a case is really an actor, for he has an interest in the suit beyond and apart from the plaintiff's demand,—the recovery of the amount of his set-off by as much as it is in excess of the plaintiff's demand, and for which he is entitled to a verdict and judgment and execution.

Perhaps, in this province, if he were to bring an action for the same demand he had set off against the same party in a separate action it might be held to be vexatious, as in the nature of a second action, and unnecessary.

That rejoinder; as now pleaded, we hold to be good in law.

Then the defendant, by way of rejoinder, has demurred to the third and fourth replications to the sixth plea—the one alleging the plaintiff sues as executor ; the other as trustee for the assignee of the demand—chiefly on the ground of departure, and also because the plaintiff has given no answer to the sum claimed by the set-off which is in excess of the demand sued for.

Firstly, is there a departure in the pleadings by reason of the declaration being in the plaintiff's own individual character, and the replication setting up that he is suing in other and different characters ?

Speaking for myself alone, I was inclined to consider on the former argument that the replications were not a departure, but that the plaintiff might set up his real character of plaintiff, in like manner as a bankrupt or insolvent plaintiff suing in his own name may reply to a plea of bankruptcy or insolvency that he is suing for the benefit of his assignees, or as a trustee for one to whom he had assigned the claims to the knowledge of the defendant before his bankruptcy or insolvency, and as he may do in other analogous cases.

There was no decision, however, pronounced on this point, as it was not necessary to do so.

The authorities shew that if A. have a demand, either due or accruing due against B., and he assign it to C., and an action is brought at C.'s instance, and for his benefit, in the name of A., that B. will not be allowed the benefit of a set-off which he has against A. unless he had it, that is unless the debt claimed as a set-off were due and payable to him by A., before he, B., had notice of the assignment; unless the two debts were so connected together as arising out of, or as being connected with the same transaction, that it would be inequitable to separate them; or unless there was some arrangement between A. and B. before the assignment to C., which would make the exclusion of the set-off inequitable.

The rules are: that choses in action are assignable in equity: that the assignee takes the chose in action subject to all the equities which affected it in the hands of the assignor: that to bind the debtor the assignee must give him notice of the transfer: that before notice, all dealings fairly had between the original parties are binding on the assignee who has failed to give notice of his rights: that after notice given all transactions between the original parties are invalid as respects the assignee.

There are many cases on this subject in equity, *Mangles et al. v. Dixon et al.*, 3 H. L. Cas. 702, is the leading one: see also *Stephens v. Venables*, 30 Beav. 625; *Re Agra & Masterman's Bank*, L. R. 2 Ch. 391; *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *In re General Estates Co.*, L. R. 3 Ch. 758; *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458.

At law there are the following cases: *De Pothonier v. De Mattos*, E. B. & E. 461; *Wilson v. Gabriel*, 4 B. & S. 243; *Watson v. Mid Wales R. W. Co.*, L. R. 2. C. P. 593; *Higgs v. The Northern Assam Tea Co., Limited*, L. R. 4 Ex. 387.

The case of *Wilson v. Gabriel*, 4 B. & S. 243, was cited by Mr. Richards in the argument, but the replication there did not, as was pointed out in *Wilson v. Mid Wales R. W. Co.*, L. R. 2 C. P. 593, shew that the set-off had not accrued

to the defendant before the assignment of the debt, or before notice was given of the assignment.

These cases unquestionably settle that in equity, or by the proper equitable pleading at law, the real plaintiff, who is the assignee of the nominal plaintiff's rights, and who is carrying on the suit for his own benefit, may repel any defence which interferes with his equitable rights as such assignee. And they are based on the same principle upon which the Court in an action at law has prevented the defendant from setting up the release from or a payment to the nominal plaintiff in fraud of the beneficial plaintiff: *Legh v. Legh*, 1 B. & P. 447.

These replications do not shew that the defendant dealt with the plaintiff knowing that he was, or that he was acting as executor in his purchase of the goods; nor does the fourth replication shew that the defendant had ever any notice of the assignment by the executors to Haldan & Morland; nor that the set-off was not due to the defendant before the assignment; nor does either replication shew that the estate of Benjamin Parsons will be affected prejudicially, in any way, by the allowance of the set-off,—as the plaintiff may be quite able to make good the amount of the set-off—that is, the amount of his own personal debt which he is getting the benefit of, to the estate he represents as executor.

And I am inclined to think the replications are bad, for all or for some of these reasons. He has not made a full title for relief: *Herbert v. Sayer*, 5 Q. B., in Ex. Ch., 978.

I have not a positive opinion that a person having a cause of action which he might sue for either in his own right or as executor, can, to a set-off pleaded in an action brought in his own right, reply, for the purpose of excluding the set-off, a state of facts which shewed that the action he had brought was in truth an action for the benefit of the estate, and that the money when recovered would be the money and assets of the estate, or any other circumstances whatever which could constitute a sufficient equitable answer to the set-off.

There are numerous cases in which the action is brought in the name of one who is bankrupt, and who to a plea of bankruptcy is permitted to reply, that he assigned the debt before his bankruptcy to a particular person, of which the defendant had notice, and that he sues as trustee only for the assignee,

In such action the proceedings must be carried on in the name of the bankrupt, and could not be carried on in the name of the assignee or *cestui que trust*.

That is the distinguishing feature between these cases and the case of *Kingsmill v. The Bank of Upper Canada*, 13 C. P. 600, and the present case; for in this action the plaintiff was not obliged to sue in his personal right; and having elected to do so, can he be allowed, to defeat the set-off, to reply as an equitable answer that he is suing in fact in his representative capacity, as executor, and to allege that the cause of action is one that belongs to the estate?

But I think he may do so. It can do no wrong to the defendant. It would be unjust he should have his debt paid from a fund he has no right to resort to, and which is appropriated to other persons and purposes; and it would be hard to make the plaintiff answerable for a *devastavit* in such a case if he be not able to make good the loss from his own means, and to subject those who are interested in the assets to a loss in case the executor were unable to make it good to them, when they are not able to control the executor, and say whether he shall or shall not sue in his own private right or otherwise.

There is one case in which an action which might be brought *either* by the uncertificated bankrupt or insolvent or by his assignees, will be protected for the benefit of the general creditors, if it be brought in the bankrupt's name, against his personal liability, which is somewhat like the present case: *Herbert v. Sayer*, 5 Q. B., in Ex. Ch, 974.

There the uncertificated bankrupt sued in respect of after-acquired property to his bankruptcy, and sued in his own name. His bankruptcy was pleaded. The plea was held

bad on demurrer, because it did not allege that the assignee had intervened with respect to the subject of the suit, and it was competent for the bankrupt to carry on business for and on behalf of his assignees in his own name, and to sue in respect of such matter so long as they permitted him to do so.

If the plea had been good in that case the plaintiff might have traversed it, and shewn that he was acting for and on behalf of the assignees, or he might have replied that fact.

If in this case the defendant could have rejoined a personal dealing by the plaintiff with the estate, in his own name, and apparently for his own benefit, and that those interested in the estate acquiesced in that state of affairs, and that the defendant dealt with the plaintiff in his personal right, and such other circumstances which might be relied upon to repel the equity which was set up, it might be a good answer: *Tucker v. Hernaman*, 17 Jur. 450, 723.

A set-off may be allowed which is due to the claimant of it by the sole next of kin, and the person beneficially entitled to the estate of a deceased party, upon its appearing that all claims and debts had been paid, as against the demand of the personal representative of the deceased; the Court regarding the substance of things rather than the formal and technical character of the parties or the rights they represented, when no harm could result from such a course: *Jones v. Mossop*, 3 Hare 568.

If in this case no harm can result to the estate represented by the plaintiff by leaving these parties to settle and arrange their own transactions according to their legal rights in this suit—and no case of harm or prejudice has been shewn by the plaintiff, why should not the case be dealt with here according to the legal rights of the parties? In my opinion that is the course which should be adopted.

It was for the plaintiff, who desired to displace a valid defence, and to claim immunity from it on special grounds, to make out his equitable case, and he has not done so: *Herbert v. Sayer*, 5 Q. B., in Ex. Ch., 974.

I think, with respect to the third and fourth replications

to the sixth plea, that there is not a departure, for the reasons before stated; but the replications are insufficient, because they do not shew any such full and satisfactory ground for equitable relief against the legal set-off which has been pleaded to this apparent personal demand of the plaintiff, although such demand is not in fact the debt of the plaintiff in his own right, but the debt of the estate which he represents as executor. And the fourth replication is bad on the further ground, that it does not shew the set-off pleaded had not accrued to the defendant before the executors assigned the debt sued for, and because it does not allege the defendant had any notice of the assignment.

Then as to the second, third, fourth, fifth and six surrejoinders pleaded to the fourth rejoinder before set out, to the second replication, of the statute of limitations, to the sixth plea, of set-off.

The second surrejoinder is a departure, for after the plaintiff had replied that the causes of action did not accrue within six years, he now surrejoins they did not accrue within five years, and the causes of action are extinguished by the law of the Province of Quebec where they accrued.

Judgment must be on it for the defendant.

The third surrejoinder is pleaded to the fourth rejoinder to the second replication to the seventh plea. There is no fourth rejoinder to the replication to the seventh plea.

There is a fourth rejoinder to the replication to the sixth plea. The seventh plea is out of the line of the demurrer altogether, and has been already, with all the pleadings connected with it, disposed of. It is not a mere mistake in describing the sixth plea for the seventh plea. It is not pleaded in fact to the sixth, but to the seventh plea, for that is the plea which sets up the special agreement in this surrejoinder. It is in no way an answer to the set-off of the sixth plea, and it cannot possibly be an answer to the accord and satisfaction in the seventh plea mentioned, nor any answer to the allegation in that plea that the defendant was to be at liberty to proceed to judgment in that suit against the plaintiff if he desired to do so.

Neither on the merits nor in form can this pleading be sustained.

There will be judgment on it for the defendant.

The fourth surrejoinder is a repetition of the third replication, with the exception of the allegation contained in the later pleading, that the defendant knew the plaintiff was acting as executor at the time he sold the goods which constitute the cause of action to the plaintiff; but that allegation will not alone make a full equitable answer, from what has been already said in disposing of the third replication to the sixth plea.

There will be judgment on it for the defendant.

The fifth surrejoinder is very nearly a good pleading. It is sufficient if the allegation in it "of all which the defendant had notice," means that the defendant had notice of the assignment *before* he acquired his set-off.

The averment is, that before the term of credit to the defendant had expired, and before the set-off accrued to the defendant, the executors assigned the debt sued for by the plaintiff, of all which the defendant had notice,

That allegation means only that *the assignment* was made before the defendant's credit had expired, and before he had acquired his set-off, and that the defendant had notice of these facts; not that he had notice of them at any particular time, excepting before the commencement of the suit; and for all that the pleading shews the defendant may have had notice of that fact the day before the commencement of the suit, and years after he had acquired his set-off.

The allegation should have been direct and positive—of all which the defendant had notice before he had acquired his set-off.

The importance of that fact is seen by reference to *Birch v. Lee*, 1 A. & E. 804, and the notes; *Watson v. Mid-Wales R. W. Co.*, L. R. 2 C. P. 593; *Stephens v. Venables*, 30 Beav. 625.

For the want of a proper averment in that respect, there will be judgment on it for the defendant.

The sixth surrejoinder is certainly bad, for it is a compendious fifth surrejoinder, without any allegation of notice to the defendant of such assignment, and cannot therefore bar his set-off.

There will be judgment on this pleading also for the defendant.

The fourth, fifth and sixth of these surrejoinders are, I think, bad also, because they afford no appropriate or logical answer to the fourth rejoinder.

That rejoinder is, in effect, that the replication of the statute of limitations, of six years having elapsed, should not be allowed to exclude the set-off, because after the termination of the former action the defendant again pleaded his set-off to the new action of the plaintiff, begun on the day after he had discontinued his former suit, within a reasonable time after the termination of that suit; and what answer is it for the plaintiff to say to this rejoinder that the plaintiff sues as executor or trustee?

These are in fact the subjects of a replication to the plea of set-off, and not grounds of answer to a rejoinder shewing that the legal bar of six years should not prevail.

The result of all this is, there will be judgment for the defendant on the demurrers to the second, third, fourth, fifth, and sixth surrejoinders; on the demurrer to the second and third replication to the seventh plea; and on the demurrers to the third and fourth replications to the sixth plea.

Judgment accordingly.

JAMES McCOPPIN V. WILLIAM McGUIRE.

Ejectment—Will, construction of—Vested or contingent interest—Registration of judgment—Priority—Sheriff's sale—Deed by infant—Re-acknowledgment—Title by estoppel.

The will of P. M., dated 23rd of October, 1838, devised to his third son W. M. "when he comes of age," part of the homestead farm, describing it, and some personal property. It also devised to the eldest son, P., "when he comes of age," the remainder of the homestead farm; and proceeded, "out of which said homestead farm, I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also when my son William shall come of age to have for her own use and benefit the new part of the house lately erected. * * * I moreover will that my said wife shall dwell in my said house, * * * and receive the rents and profits of the said farm, to bring up and support my said children, * * * while she remains my widow." The will also provided that the stock on the said farm should be kept for the benefit of the farm under the direction of the trustees until Peter should come of age.

Semble, per RICHARDS, C. J., that W. M. took a vested interest in the land subject to be devested on his death before coming of age.

Held, that if not he took at least a contingent and future interest which might be disposed of by deed under Consol. Stat. U. C. ch. 9, sec. 5.

W. M. above mentioned, came of age on the 27th August, 1857. On the 1st of July previous, he executed a deed of the premises in question to U., under whom defendant claimed, which was registered on the 26th of August. This deed was re-acknowledged between the 28th and 30th of August, and the re-acknowledgment registered on the 5th of September in the same year. On the 28th of August, a judgment was entered up against W. M. in favor of the plaintiff on a confession of judgment in assumpsit, signed the same day, and the plaintiff claimed through a sale by the sheriff upon a writ placed in the sheriff's hands on the 5th of October, 1857.

Held, that there had been a sufficient re-acknowledgement of the deed by the infant, that the confession of judgment was not *per se* an act done to avoid the deed.

Held, also, following *Wales v. Bullock*, 10 C. P. 155, that the deed from W. M. being given before the teste of the *fi. fa.* lands, and delivery to sheriff, though after the registration of the judgment, was valid, and the sale by the sheriff under the execution passed no property to the purchaser.

Quære, whether the deed of W. M., an infant, unless legally avoided, would operate by estoppel to pass the title to the land, as soon as the fee vested in him on obtaining his majority.

EJECTMENT—For lot 198, of the Township of Thorold, in the County of Welland, devised to William Misener by his father Peter Misener, lying north of the Chippawa road, save and except 50 acres at the north end thereof.

Defence for the whole.

The plaintiff claimed title by virtue of a deed from the Sheriff of the County of Welland, under a judgment against William Misener, who claimed under the last will and testament of Peter Misener, who claimed under the grantee of the Crown ; and also by virtue of deeds from the said William Misener to the plaintiff.

The defendant, besides denying the title of the plaintiff, claimed title in himself by virtue of a deed from James Norris and Sylvester Nulon, who claimed under a deed from the Sheriff of the County of Welland, under which he sold the interest of one Joseph Upper in these lands, who claimed under deed from William Misener, who claimed, &c., as above.

The cause was tried at the last Fall Assizes for Welland, before Wilson, J., without a jury.

A written admission was put in at the trial.

1. That the plaintiff and defendant both claimed the property in question in this cause under the will of Peter Misener, under a devise therein to William Misener.

2. That the probate of the said will should be used instead of the original.

3. That the exemplifications of judgments and executions, and the sheriff's deed, under which the plaintiff claimed, should be admitted when produced.

4. That William Misener became of age on the 27th of August, 1857.

5. That the judgment under which plaintiff claimed was entered on the 28th of August, 1857, and registered in the county registry office of Welland against lands on the same day.

6. That the deed of the land in question was made by the said William Misener to Joseph Upper, on the first of July, 1857, registered on the 26th of August following, re-acknowledged after William Misener became of age, (but the exact day to be proved), and acknowledgment registered 5th of September, 1857. This deed to be produced.

7. Exemplifications of judgments, executions, and sheriff's deeds on executions against Joseph Upper, to be admitted when produced, and also deed to defendant when produced.

The probate of the will of Peter Misener, dated the 23rd of October, 1838, was put in. Amongst other devises was the following :—

“Third. I give and bequeath to my third son, William Misener, when he comes of age, one hundred and fifty acres of land, part and parcel of the homestead farm on which I dwell, on Chippawa Creek, to be measured off the west side, the line to be run north and south, beginning at centre, next John Watson’s, leaving the allowance for the road. Also one yoke of cattle, one horse or mare, saddle and bridle, two cows, one new lumber waggon for two horses, and the sum of five hundred dollars in money.

Fourth. I give and bequeath to my eldest son Peter Misener, when he comes of age, the homestead farm on which I now reside, on Chippawa Creek, with the dwelling house, outbuildings, and appurtenances thereof, with the remainder of the land, amounting to about 300 acres, more or less, after the line has been run dividing my said son William’s share, out of which said homestead farm I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also when my son William shall come of age to have for her own use and benefit the new part of the house lately erected, together with the use of the cellar, wood house, barn, stable, and piggery, together with a mare called Highley, and three cows. * * * I moreover will that my said wife shall dwell in my said house of the homestead farm, and receive the rents and proceeds of the said farm, to bring up and support my said children while she remains my widow.”

After providing for calling in outstanding debts, for payment of his debts, and for funeral expenses and schooling for his children, the will proceeded : “I will and desire that stock upon my said farm shall be kept for the benefit of my said farm, under the directions and management of my said trustees, until my son Peter comes of age.”

Peter was the eldest son, and his wife and another executor were his trustees. There was a second son, Abraham Neville, to whom he devised the Neville farm.

The defendant claimed under a sale of the land under an execution against Joseph Upper, and Upper's title depended on a conveyance from William Misener to him, dated 1st July, 1857, and registered, first, on 26th August, 1857, at three o'clock, p.m., and secondly, on 5th September, 1857, at ten o'clock, a.m.

The deed was made pursuant to the statute for facilitating the conveyance of real property, between William Misener, of the Township of Thorold, in the County of Welland, yeoman, party of the first part, and Joseph Upper, of the same place, innkeeper, party of the third part, for the consideration of \$400 of lawful money of Canada. The party of the first part granted to the party of the third part in fee the land in question.

Endorsed on this deed was the following memorandum :

"I do hereby re-acknowledge the within indenture to be just and true, in presence of witnesses.

(Signed) WILLIAM MISENER.

Witnesses : (Signed) JAMES UPPER.

(Signed) WM. WRIGHT.

Dated this 27th day of August, 1857."

The following evidence was given :

Joseph Upper stated that the re-acknowledgement of the deed was made by Misener at the house of James Upper, at Allanburgh, on the 28th or 29th of August, the day after Misener was supposed to be of age. His son James found Misener a day or two after he was of age, and he reacknowledged the deed. He would not say it was not on the 30th of August. He stated that Misener went away sporting two days, and his son found him on the 28th. He could not say positively it was the 28th or 29th. It might have been the 29th, but he thought it was the 28th.

James Upper said he could not tell the day exactly on which the deed was re-acknowledged. Misener said McCoppin wanted him to make him a deed of fifty acres, but he, Misener, refused to do so. He said he had sold it to Upper. The instrument was dated before being signed.

Misener was a day or two of age at the time it was executed. The deed was obtained from the registry office by Joseph Upper the night it was acknowledged. He went to the registry office, (at Fonthill), between 10 and 11 o'clock of the night. It was acknowledged. It was brought down to Misener and acknowledged that night. James Upper found Misener the night the deed was acknowledged, about 9 o'clock, in Ashfield's hotel, in Port Robinson, and two of McCoppin's clerks watched him. He wanted to get Misener down to re-acknowledge the deed, and he had a great deal of trouble to get him away for that purpose. Joseph Upper went to Fonthill after James arrived with Misener at his place. James said on the way from Asher's to Allenburgh that he and McCoppin had been out to Fonthill; he understood him to say the same day that he had been acknowledging a judgment, and that McCoppin wanted him to make a title of these fifty acres in dispute, and he told him he could not, for he had sold it to Mr. Upper. Joseph also said Misener had told him he had been at Fonthill with McCoppin. He understood he had been with him at Fonthill that day.

McCoppin said Misener came of age on the 27th August, 1857; that he was with him all the day of the 26th and 27th. They slept together; they were shooting on the marsh. They came home on the evening of the 28th. He could not say where he stayed that night. He went away with his clerk on the morning of the 29th, and did not return until the evening of the 30th. He and Misener came home about sundown on the 28th, after having come to Welland and got the judgment for £600 entered up. They then went to Fonthill and got it registered in the county registry office. Misener was with him that whole day, until sundown of that day. When in the registry office at Fonthill, Misener said he had made a deed to Upper whilst he was a minor, but he would not let him have it as he had not paid him for it. The deputy registrar said, here is the deed, and handed it to them, and they looked at it, and there was no acknowledgment on it at that time. Misener

was at his place that evening at sundown; thinks he stayed all night at his place. Could not say he slept at his house, but he slept at the village, for he was there early in the morning of the 29th, and his place was three or three and a half miles from Upper's.

Misener himself said that on the 27th of August he stayed all night at Mr. McCoppin's father's. On the morning of the 28th he went with McCoppin to St. Catharines and made an acknowledgement of what he owed him. They then came to Welland, then to Fonthill, and that night he stayed at McCoppin's, but he was not sure. It was either there or at Mr. Bell's. On the 29th, he and another person drove to Alex. Latimore's hotel, at Marshville, and stopped all night. The next day they came to Port Robinson, to his home, about the time of closing the stores; they said James Upper was looking for him, and a few minutes after Upper met him at Asher's tavern. They went to James Upper's house that night, and he sent for Joseph Upper. He said he did not tell Wright that night that he had been at Fonthill with McCoppin that day. That was the 30th of August.

The weight of evidence seemed to be that the re-acknowledgment of the deed to Upper did not take place before the 29th, and probably on the 30th of August.

The learned Judge entered a verdict for the defendant, as he was in possession, but the whole case was subject to the opinion of the Court.

The plaintiff at the trial contended that the will of Peter Misener gave no estate to William Misener until the latter became of age:—

That the judgment of the 28th of August, registered on the same day, in favor of the plaintiff, against Peter Misener, and the subsequent deed from the sheriff to the plaintiff under the execution issued on that judgment, vested William Misener's estate in the plaintiff;

That when the deed of 1st of July was executed, William then being under age, and no estate in him, the acknowledgment of the deed afterwards, when he

became of age, had no effect, and it could not, being executed before his majority, operate by way of estoppel;

That if the acknowledgment be valid, then that the plaintiff's judgment, registered on the 28th of August, 1857, before the registry of the re-acknowledgment on 5th September, followed by the sale under the execution, vested the title in the plaintiff.

In Michaelmas Term *J. H. Cameron*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff, pursuant to leave reserved.

During the term *Harrison*, Q. C., shewed cause. The writ against lands and sale under it were after the confirmation of the deed given when William Misener was an infant, and therefore must be postponed to the deed. There is a difference between the mode of vesting under devises of real estate and bequests of personalty when an infant comes of age. There are three classes of these devises:

1. When there is a preceding devise of the estate during the minority of the residuary devisee.

2. When the estate is devised over if the devisee dies before he comes of age.

3. When there is no devise of either of the kinds named.

As to wills under the first class: *Boraston's Case*, 3 Rep. 18; *Manfield v. Dugard*, 1 Eq. Ca. Abr. 195; *Goodtitle d. Hayward v. Whitby*, 1 Burr. 228; *Edwards v. Hammond*, 3 Lev. 132; *Denn d. Satterthwaite v. Satterthwaite*, 1 W. Bl. 519; *Kerlin's Lessee v. Bull*, 1 Dall. 175; *Hodgson v. Gemmil*, 5 Rawle. 99; *Doe d. Wheedon v. Lea*, 3 T. R. 41; *Bromfield v. Crowder et al.*, 1 B. & P. N. R. 313.

As to the second class: *Bromfield v. Crowder et al.*, 1 B. & P. N. R. 313; *Doe Hunt v. Moore*, 14 East 601; *Warter v. Hutchison*, 1 B. & C. 721; *Doe Dolley v. Ward*, 9 A. & E. 582; *Wells v. Ritter*, 3 Whart. 208; *Cowdin v. Perry*, 11 Pick. 503; *Redfield on Wills*, 2nd ed. vol. ii. 220.

As to the third class: *Phipps v. Ackers*, 4 M. & G. 1007, 9 Cl. & Fin. 583. This case differs from *Duffield v. Duffield*, 3 Bli. N. S. 260, where there were several contin-

gencies which do not arise here. *Russell v. Buchanan*, 2 C. & M. 561, is distinguished from the other cases, because there was a special provision in the codicil that the estates should not vest but only be contingent. In *Doe d. Rew v. Lucraft*, 8 Bing. 286, the devise was to such of his sons as should first attain 21 years. *Festing v. Allen*, 12 M. & W. 279, is a case chiefly relied on by the other side; there the devise was to a class who should attain 21, and not to an individual. There it was contingent, not vested. He also cited *Hawkins on Wills*, 237 *et seq.*; *Newman v. Newman*, 10 Sim. 51, per Shadwell, V. C. at p. 57; *Bull v. Pritchard*, 5 Hare 571; *Doe d. Bills v. Hopkinson*, 5 Q. B. 223; *Marcon v. Alling*, 5 Gr. 562; *Alexander v. Alexander*, 16 C. B. 59; *Evers v. Challis*, 7 H. L. Cas. 531, where *Festing v. Allen* is reviewed: *Hawkins on Wills*, 223, 234, draws a broad distinction between personalty and realty. There is no decision against the law as laid down by these authorities, and upon them it is submitted that this case comes under the first class, and *Boraston's* case, 3 Rep. 18, governs. Such was evidently the testator's intention; but if we come under the third class we are still entitled to succeed. If the estate be a vested one it has been conveyed to Upper. As to the effect of a deed of an infant, see *Zouch dem. Abbott v. Parsons*, 3 Burr. 1794; *Handcock's* case, 17 Ves. 383; *Doe dem. Jackson v. Woodruffe*, 7 U. C. R. 332; *Doe Mills v. Davis*, 9 C. P. 510; *Tucker v. Moreland*, 10 Pet. 58; *Allen v. Allen*, 2 Dr. & War. 307, 338; *Slater v. Trimble*, 7 Ir. Jur. N. S. 255; *Brunker's* Dig. 1140 "Infant." The onus is on the other side to shew an avoidance by the infant, and when there is no avoidance by the infant shewn it is no matter when the confirmation was made, for the estate is in the grantee without confirmation. The plaintiff cannot sustain the doctrine that his right to recover relates back to the registration of the judgment. It only dates from the time he obtained the deed from the Sheriff: *Wales v. Bullock*, 10 C. P. 155; *Thirkell v. Patterson*, 18 U. C. R. 75; *Fraser v. Anderson*, 21 U. C. R.

634; *Chambers v. Dollar*, 29 U. C. R. 599; *Bank of Montreal v. Thompson*, 9 Gr. 51.

J. H. Cameron, Q. C., contra. The statute as to conveying contingent interests, Con. Stat. U. C., ch. 90, secs. 5 & 6, does not apply to the interest of William Misener in the land claimed under the will of his father, as this interest was created at a time the statute does not apply to. The devise does not come under the second class. That class refers to estates which are vested, but the devisees are only prevented from taking possession until they are twenty-one. Here there is no devise over or reference to it during his minority: *Powell on Devises*, 3rd ed. vol. ii. 221; *Alexander v. Alexander*, 16 C. B. 59; *Festing v. Allen*, 12 M. & W. 279; *Hanson v. Graham*, 6 Ves. 239; *Preston on Estates*, vol. i. 319 *et seq.* The question of priority of registration is fully treated of by Mr. *Leith*: *Leith's Blackstone*, 319, 320, 321. The deed of the infant could not operate by way of estoppel. As he was never before ratification estopped from denying being bound by the deed itself, *a fortiori* he was not estopped by the deed. At all events the estoppel would not operate to bar us. If the estate is as we contend, the sheriff's sale vested it in us; if vested in the infant in possession only at twenty-one, then the Irish case does not apply. Giving the confession of judgment, which was registered, was an act of repudiation. With regard to the deed relating back, if the deed was only an escrow no estate passed by delivery: *Shep. Touch.*, 4, 60. At the time Misener went to register the confession, that was a repudiation, and avoidance, and the sheriff's deed gave us title.

The Court referred to *Featherston v. McDonell*, 15 C. P. 166; *Gallagher v. Gallagher*, 30 U. C. R. 415; *Slator v. Brady*, 14 Ir. C. L. Rep. 61.

RICHARDS, C. J., delivered the judgment of the Court.

The first question to be considered is, whether the interest of William Misener under the will is vested or

contingent. The inclination of the Courts seems to be to make interests of this sort vest, if they possibly can consistently with the words of the will.

Some of the cases seem reasonable enough, as when a devise is made to C. D. until A. B. is twenty-one, and then to A. B. in fee. There the effect is a vested remainder in A. B., because the whole estate is really disposed of. Some of the cases are by no means so clear.

The rule seems to be laid down that words of seeming condition are, if possible, held to have only the effect of postponing the right of possession, and if the devise be clearly conditional, the condition will, if possible, be construed as a condition subsequent and not precedent, so as to confer an immediately vested estate, subject to be divested on the happening of the contingency.

When an absolute property is given, and a particular interest given in the meantime, as, until the devisee shall come of age, and when he shall come of age, then to him, &c., the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainder man is to take possession.

It is said the principle of *Boraston's* case, 3 Rep. 18, is, that an intermediate interest carved out does not prevent the vesting, whether it be so carved out for the benefit of the devisee or of any other person, and whether it exhausts the whole intermediate rents and profits or only a part.

The devise to William Misener, when he comes of age, is of 150 acres of land, part and parcel of the homestead farm on which the testator dwelt. Then the part is described. And the testator gave to his eldest son Peter, when he became of age, the homestead farm on which he resided, with the remainder of the land after the line had been run dividing William's share. He added, "Out of which said homestead farm I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also, when my son William shall come of age, to have for her own use and benefit the new part of the

house." He moreover willed that his said wife "shall dwell in my said house of the homestead farm, and receive the rents or proceeds of the said farm, to bring up and support my said children while she remains my widow."

Now, if this latter devise had been "to receive the rents and proceeds of the said farm until my sons shall respectively reach the age of twenty-one, and then my son William shall have the 150 acres," I suppose the interpretation would be that the interest of William was vested, but he would not take possession of the rents and profits until he was twenty-one.

Could he even do so now, under the devise to the mother if she remained a widow, yet, no doubt, at twenty-one he took a vested interest under the will, though the mother might have the rents and profits during her widowhood.

The case which comes nearest to this that I have met with is *Bigelow v. Bigelow*, 19 Gr. 549. There the testator willed "that Josiah Bigelow, my son, shall have the homestead, and that the property be divided in the following manner: First, That all my just debts be paid out of the personal property, and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from the estate; that the property be appraised after my death. My will is that my wife Eunice Bigelow, so long as she remains my widow, shall have two cows kept for her maintenance, and a girl, should her have one left her, and a doctor if necessary. The family to be maintained on the place with every necessary thing for their use. That the younger branch of the family receive a common education equal with the rest of the family."

The learned Vice-Chancellor Strong, in his judgment, speaks of the tendency of the Courts to decide devises of realty as vesting rather than contingent. He then refers to *Boraston's* case and other cases decided since. He then applies the doctrine of the other cases on the subject to

the case before him, and at p. 555 says: "Whilst it is clear that there is no gift over, there is, I think, a sufficient gift of an intermediate interest to bring this will within the rule just stated. I find this in the words, 'The family to be maintained on the place with every necessary thing for their use.' This, undoubtedly, amounts to a gift of maintenance out of the rents and profits of the estate to each child until the attainment of majority, and a right to the personal enjoyment of that maintenance on the land itself. The context shows that the word 'family' here means 'children.' And, like every gift of maintenance, this must be taken to mean maintenance during minority. There is, therefore, an intermediate interest given here commensurate with the minority of the youngest child. This is quite sufficient, on the authorities just quoted, to satisfy the rule referred to, which I take to depend on this, 'that where the testator shews a reason for postponing the possession it is evident that nothing but the enjoyment was intended to be postponed,' which is the reason given by Sir William Grant, in *Hansom v. Graham*, 6 Ves. 239. In this will the testator shews the best of reasons for postponing the enjoyment, namely, that a maintenance may be reserved to each child during minority."

In this case there is an obvious intent that the wife should have the rents and proceeds of the homestead farm to bring up and support the testator's children, meaning, of course, until they were twenty-one years of age; and that would be a good reason why the sons should not take the rents and profits before they were twenty-one.

The additional clause, "while she remains my widow," might shorten the time of her enjoyment, but I cannot see why it would shew any different intent on the part of the testator in having the sons' interest in the property vest immediately, though the enjoyment should be postponed.

In *Bigelow v. Bigelow* the learned Vice-Chancellor Strong states, in his judgment, at p. 554, "It never has been expressly decided that a devise to A. when he shall attain twenty-one, standing isolated, without any gift over or

any disposition of an intermediate estate, would confer a mere contingent interest; but, on principle, and what is found stated by text writers of authority, it must be assumed that that would be the proper conclusion."

In *Doe Hunt v. Moore*, 14 East 603, 604, Lord Ellenborough points out the distinction between bequests of personal estate and devises of real property. In bequests of personal estate, it is held that a legacy given to one if or when he shall attain twenty-one, lapses in the event of the legatee dying under twenty-one. "For the rules by which legacies are governed are borrowed all or the greater part from the civil law, whereas the decisions on the devises of real estate have established a different rule; and according to them a devise to A. when he attains twenty-one, to hold to him and his heirs, and if he die under twenty-one then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him; but the dying under twenty-one is a condition subsequent, on which the estate is to be divested." In a later part of the judgment he says, "The estate vests immediately, whether any particular interest is carved out of it to take effect in the meantime or not."

If this part of his remarks is to be considered as laying down a general principle, it would settle the point in this case, but I suppose it will be considered as applying to the facts in that particular case, where there was a devise over in case the person named died before he should attain the age of twenty-one.

In some of the later cases the Judges expressly avoid deciding the question whether a devise to A., if or when he shall attain the age of twenty-one, standing isolated and detached from the context, would confer a contingent interest only.

Tindal, C. J., in *Phipps v. Akers*, 4 M. & G. 1107, 9 Cl. & Fin. 583, in giving the opinion of the Judges which was reported to the House of Lords, says, at p. 590 of the latter report: "It is not necessary for us to say what would be the legal effect of a simple

devise to A. and his heirs when or if he shall attain twenty-one, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent. In such a case Mr. Fearne may be right in the opinion found amongst his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But whatever may be the true meaning of such a devise if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favor of some other person."

On the whole, though certainly not free from doubt, I think the devise to William Misener, in connection with other parts of the will under discussion, created an interest in the land in dispute which vested immediately, but which would be divested in the event of his dying before he became of age.

But supposing that not to be the case, it nevertheless, I think, without doubt, created an interest contingent and future in the land referred to, which might be disposed of by deed under Con. Stat. U. C., ch. 90, sec. 5.

In the view which I take, then, the substantial interest of William Misener could be conveyed by deed, and if he conveyed by a deed which was valid, and he lived until he was twenty-one years of age, his conveyance would pass the fee of the land to the party purchasing from him, such conveyance having been registered before the judgment obtained by the plaintiff in this action in his suit against Misener was entered.

Then was the conveyance executed by William Misener to Joseph Upper, dated July 1st, 1857, valid in law to pass his interest in the land in question? The only objection suggested on the trial was, that at the time he executed the deed he was an infant under the age of twenty-one years; that he became twenty-one years of age on the 27th

August, 1857, nearly two months after the deed was executed.

The cases cited on the argument and decided in our own Court are to the effect that the deed of an infant is not void, but only voidable.

A voidable deed is valid until some act is done to avoid it, and it lies on those who claim in opposition to the deed to show that such an act has been done. This matter was discussed and considered by me in *Featherstone v. McDonnell*, 15 C. P. 162.

The principal thing shewn to avoid this deed by the infant is his giving a confession of judgment in an action of assumpsit brought by this defendant against him, which was signed on the day after he attained his majority, and under an execution issued on that judgment the property was sold.

In *Slator v. Brady*, 14 Ir. C. L. Rep. Ex. 61, it was held that giving another lease after the lessor became of age, of the same premises, for the same period of time, and perhaps something more, did not necessarily repudiate the first lease granted whilst the lessor was an infant.

Whether it is this case or another case, in which one of the parties bears the same name as the plaintiff above referred to, that there is a note of in *Brunker's Digest*, under the head of 'Infant' 1140, I cannot say, for I have not been able to refer to *Slator v. Trimble*, 7 Ir. Jur. N. S. Q. B. 225, where it is said to be reported.

The digest of the case in *Brunker* reads as follows: "A while an infant, made a lease to B." Subsequently, and while A. continued an infant, a demand of possession was made and an ejectment brought by A., by C., his next friend. Before the trial of the ejectment A. attained his age of twenty-one years, and made a lease of the lands to C. Subsequently, and still before the trial, A. received rent from B. and executed a confirmation of his lease. At the trial, on this state of facts, a verdict was directed for the defendant, and the verdict was upheld by the Court."

These Irish cases are, in the circumstances, much more against the deed of the infant being considered binding than what is suggested here, particularly when the deed of the infant was re-acknowledged by him not later than the 5th of September, within ten days after he attained his majority.

I fail to see, however, how giving a confession of judgment in an action of assumpsit is, *per se*, an *act done* by the defendant in that suit to avoid a deed given by him when he was an infant.

It is not necessary to decide that the deed of the infant, unless legally avoided, would operate by way of estoppel to pass the title to the land conveyed by the deed as soon as the fee vested in him on attaining his majority. The case already referred to; *Featherston v. McDonell*, 15 C. P. 166, goes far to sustain that view.

But if the contingent interest which he did possess could properly be conveyed under the statute as soon as it ripened into a title, by virtue of the statute it became vested in the purchaser, and the deed need not operate by way of estoppel.

If, however, it be considered that the conveyance was wholly inoperative and void until it was re-acknowledged, and only took effect from that date, then I apprehend that the decided cases in our own Courts shew that the sale under the execution issued on the plaintiff's judgment against Misener, and the conveyance by the Sheriff, did not pass the interest in the land which was conveyed by the deed of Misener to Upper.

The execution against lands in *McCoppin v. Misener* was issued on the 28th of September, 1857, and was placed in the Sheriff's hands on 5th October, 1857. Now, supposing William Misener to have conveyed the land to Upper by a deed dated 5th September, 1857, before the teste of the writ of *fi. fa.* against lands and its delivery to the Sheriff, though after the registration of the judgment; then, according to the decided cases, the sale of the land under the execution and conveyance by the Sheriff would

not pass the property to the purchaser at the Sheriff's sale, as against the deed to Upper.

Wales v. Bullock, 10 C. P. 155, is, in its essential points, the same as this case, and that case was decided on the authority of *Thirkell v. Patterson*, 18 U. C. R. 75, and both cases are adhered to in *Fraser v. Anderson*, 21 U. C. R. 634.

In *Wales v. Bullock*, 10 C. P. 155, Thomas Woodbridge owned the land in dispute, in fee. The title was a registered one. On 10th November, 1855, judgment was obtained against Woodbridge for £500 and costs; and that judgment was duly registered on 13th November, 1855. A *fi. fa.* against lands was placed in the hands of the Sheriff of Essex, on the 20th October, 1856, and under a *ven. ex.* subsequently issued the lands were sold on the 26th October, 1859. Woodbridge, on the 27th March, 1856, conveyed the land to defendant for a valuable consideration, which deed was registered on the 16th February, 1858. It will be observed that Woodbridge conveyed the lands before the *fi. fa.* was put into the Sheriff's hands, but after the judgment was recovered and registered, and the deed was registered before the Sheriff sold under the writ of *fi. fa.*

Now here, if the deed to Upper be considered as executed on the 5th of September, 1857, then Misener sold the land after the judgment was registered, and before the *fi. fa.* against lands was placed in the Sheriff's hands, and that deed was registered before the sale by the Sheriff. In this view, the plaintiff's action fails.

It was not argued that the formal re-acknowledgment of the deed by Misener did not in effect operate as a confirmation of the deed, or as a re-execution of it, whatever effect that might have.

On the whole, we think the verdict for the defendant must stand, and the plaintiff's rule will be discharged.

Rule discharged.

JUSON ET AL. V. REYNOLDS.

Crown Grants—Evidence to explain—Description of Land.

In 1796 a patent issued to R. for 528 acres, more or less, "being composed of lots 16 and 17, front concession, 16 and 17 second concession, and 17 third concession, with the broken fronts of 16 and 17 on Burlington Bay, in the Township of Barton, butted and bounded as follows, beginning at the N. W. angle of lot 15 on Burlington Bay, thence S. 18° W. 115 chains, then N. 72° W. 21 chains; then S. 18° W. 51 chains; then N. 72° W. 20 chains; then N. 18° E. to Burlington Bay; then easterly along the bay to the place of beginning. Barton is on the south shore of Burlington Bay, and the lots number from the east. At the west side of lot 15 the shore turns suddenly to the south, for some distance, so that the broken front of lots 16 and 17 are on a line with what to the eastward is the first concession, and these broken fronts contain together only 28 acres. In the description for this patent in the department the lots were called 16 and 17, "front or first concession."

The question was whether lot 16, in the third concession proper, passed by this grant.

It was shewn that the government had never asserted any right to it; and the entries in books and plans in the Crown Lands Department shewed that it had always been assumed to have been granted to R. The descriptions for patent and the patents of the surrounding lots agreed with this view; the number of acres mentioned, 528, would not otherwise be covered by the grant; and R. and those claiming under him, had held possession for more than 40 years. It was shewn also that the N. W. angle of lot 15, on the bay, was about 14 chains N. of the concession road in front of the second concession proper.

The defendant in ejectment, R.'s heir at law, contended that the description excluded this lot, so that the title was still in the Crown, and relied, among other things, upon certain old plans from the department, which the plaintiffs asserted to be incorrect.

Held, that the lot passed by the patent.

Remarks as to the nature of the evidence admissible,—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent.

Quære, whether the defendant, a mere stranger, could set up the title in the Crown as against the plaintiffs' possession for forty years with the privity of the Crown. *Semble*, that at all events the plaintiffs could have maintained trespass against him.

EJECTMENT—For lot 228, on Bold Street, as laid out and numbered on a plan and survey of the southerly part of lot 16, in the third concession of the Township of Barton, made for Archibald Kerr, William P. McLaren, and Richard Porter Street, by Thomas Allan Blyth, Esquire, Deputy Provincial Surveyor, which plan is filed in the Registrar's Office of the County of Went-

worth, to the possession whereof the plaintiffs, as executors and devisees in trust under the last will and testament of the late Archibald Kerr, claim to be entitled.

The defendant defended for the whole of the land mentioned in the writ.

The plaintiffs by their notices claimed title to the premises by virtue of a mortgage, made by one Joseph Faulkner to Archibald Kerr and others, and by them assigned to the said Archibald Kerr, whose executors and trustees the plaintiffs are; and the plaintiffs claimed that the said Joseph Faulkner was at the time of the execution of such mortgage entitled to the fee simple and inheritance in the said lands, both by virtue of divers mesne conveyances from the patentee of the Crown, and several parties claiming through him, down to the conveyance to said Joseph Faulkner, and also that he had a possessory title by length of possession in himself and those through whom he claimed. And the plaintiffs further claimed title to the said lands and premises by virtue of a deed from the high bailiff of the City of Hamilton to them, in completion of a sale made thereof for taxes.

The defendant in his notice, besides denying the title of the plaintiffs, claimed title in himself as heir-at-law of the late Lieutenant Caleb Reynolds, deceased, who was the original nominee of the Crown for the whole of the said lot 16 in the 3rd concession of the Township of Barton, and for which no patent has ever been issued from the crown, but which the defendant is entitled to have.

The cause was taken down to trial in the Fall of 1871, at the Assizes for the County of Wentworth, and was made a remanet, and was again entered for trial at the Spring Assizes for 1872, for the same county, held before Mr. Stephen Richards, Q. C., acting as Judge of Assize, for Hagarty, C. J. C. P., when a verdict was rendered for the plaintiffs with 1s. damages.

At the trial, the following documents were put in by the plaintiffs :—

1. An exemplification of a patent, dated 15th December,

1796, granting to Lieutenant Caleb Reynolds in fee certain land in the Township of Barton, containing by admeasurement five hundred and twenty-eight acres, with the usual allowance for roads, more or less, being composed of lots 16 and 17, front concession, 16 and 17, second concession, and 17, third concession, with the broken fronts of 16 and 17 on Burlington Bay, situate in the Township of Barton, in the County of Lincoln, which said 528 acres of land are butted and bounded, or may be otherwise known as follows, that is to say : beginning at the north western angle of lot 15, on Burlington Bay, thence south 18 degrees west, 115 chains ; thence north 72 degrees west, 21 chains ; thence south 18 degrees west, 51 chains ; thence north 72 degrees west, 20 chains ; thence north 18 degrees east, to Burlington Bay ; and thence easterly along the Bay, to the place of beginning.

2. A deed from Caleb Reynolds to Jean Baptiste Rousseaux, for the consideration of £250, dated 16th February, 1803, conveying 500 acres of land, be the same more or less, being composed of Lot 17 and part of 16, in the first concession ; Lots 16 and 17 in the second concession ; and Lot 17 in the third concession, with broken fronts of 16 and 17 on Burlington Bay, in the Township of Barton, which said 500 acres of land are butted and bounded as follows, that is to say : beginning at the north west angle of Lot 15, on Burlington Bay, thence south 18 degrees west, 13 chains, to a post planted in front of the first concession ; thence north 72 degrees west, 8 chains ; thence south 18 degrees west, 41 chains and 25 links ; thence south 72 degrees east, 8 chains ; thence south 18 degrees west, 60 chains, 75 links ; thence north 72 degrees west, 21 chains ; thence south 18 degrees west, 51 chains ; thence north 72 degrees west, 20 chains ; thence north 18 degrees east to Burlington Bay ; thence easterly along the Bay to the place of beginning.

3. The will of Jean Baptiste Rousseaux, dated 14th of June, 1808, (it was admitted he died before 1813), by which he devised the land to Margaret Rousseaux, William

Crooks and Abraham Marakle in fee, in trust to sell and pay debts. The will described the land as being in the possession of Albert Ryckman, and as being the land granted to Caleb Reynolds in Barton.

4. A deed, dated 12th June, 1816, from Margaret Rousseaux, executrix, &c., to James Mills and Peter Hess, conveying to Mills and Hess in fee lots 16 and 17, in the first concession, 16 and 17 in the second concession, and 17 in the third concession, with the broken fronts of 16 and 17, on Burlington Bay, excepting the 30 acres excepted in the deed from Reynolds to Rousseaux.

5. A deed of partition, dated 24th June, 1816, between Hess and Mills. This deed gave to Hess lot 16, in the first concession; 16 in the second concession; and the south half of 17 in the third concession, with the broken front of 16, with the same exception.

The foregoing deeds covered all the land granted to Caleb Reynolds, except 30 acres transferred by Reynolds to John Wagstaff.

6. A deed from Peter Hess to Archibald Kerr, McLaren and Street, was admitted. It was dated 18th June, 1853, for the consideration of £13,549, and conveyed $70\frac{1}{2}$ acres of 16, in the third concession of the Township of Barton.

7. The will of Archibald Kerr, dated 8th June, 1866, and his death were admitted, and also that the will gave the land in question to the plaintiffs in case the conveyance to Kerr passed the $70\frac{1}{2}$ acres of 16, in the third concession.

8. A deed dated 3rd November, 1833, from Hess to Tiffany and Wilson, and conveyances from Wilson to O'Reilly, of one half, from O'Reilly to Tiffany and from Tiffany back to Hess, all of which were admitted. The plaintiffs put these in to shew that at that time the concessions were considered by the parties to those deeds to be doubtful, being sometimes called the second concession and sometimes the third concession.

9. A deed from the commissioners of forfeited estates to Richard Beasley, dated 15th October, 1821, reciting

the seizin of Wagstaff of certain land, being part of Lot 16, in the front concession of Barton. This deed was admitted. The plaintiffs claimed that that was the same land that was conveyed by Caleb Reynolds to Wagstaff.

Henry Jones, an officer of the Crown Lands Department, who had been in the office thirty years, produced a plan which was recognized in the department as the ordinary office plan of the Township of Barton, and was called office plan No. 6 (A copy of the Plan is given on page 179). He thought it was compiled in 1800. It was the recognized plan in the Department of the Township of Barton. He also produced another plan of the township, which was also an office copy in the department. It was called A. No. 7. He thought it was compared or compiled about the same time as plan No. 6. He thought the names of the grantees of the lots in each plan were in the same handwriting. The plan A. No. 7 appeared to be copied from a plan dated Niagara, 25th October, 1791. There was another certificate on that plan seeming to show that it was a copy of a copy. [The plaintiffs' counsel here put in the descriptions 1, 2, 3, 4, and the extract from the Doomsday Book given below.] It was the custom in the department to mark the name of the party described for patent on each lot on the plan. Caleb Reynolds's name appeared as grantee on the plans he produced on lot 16 and 17, in the second concession, 16 and 17 in the third concession, and 17 in the fourth concession. His name was not on 16 in the first concession, but there was the letter D. on the north end of 16, in the first concession. D. means described for patent. This letter D. was not on the map or plan A. 7, but was on plan No. 6. He thought that letter D. on 16 in the first concession, on plan No. 6, was not put on at the same time that the letter D. was put on the other lots granted to Reynolds. He thought, judging from the color of the ink on the plan, that it had been put on since. His attention was first drawn to that letter D. on the plan when David Reynolds's claim was first brought before the department, as near as he could

recollect, between 1853 and 1859. [A description of the 528 acres granted to Caleb Reynolds was here put in, taken from the Crown Lands Department, and also several other descriptions, and the letter from D. W. Smith, which are given below.] He added, that if lot 16 in the first concession had been granted to Caleb Reynolds, he would have expected to see his name on that lot on the plan, and also letter D. on it. On the small parts of 16 and 17, immediately north of the concession lines, and between it and the water, the letter D. appeared on the plan. He also stated that David William Smith was Surveyor General of Upper Canada about 1791, and subsequently, and that Augustus Jones surveyed part of the Township of Barton. The plans produced shewed a first concession in the Township of Barton, and it seemed to be admitted on all hands in the evidence that from lot 1 to 15, inclusive, there was land to form a first concession, giving the full depth of 100 chains to the lots.

The plaintiffs contended that the waters of Burlington Bay jutted in on the west side of lot 15, in the first concession, so as to cut away the greater part of that lot; so that, where the line between 15 and 16 struck the water, there were only 14 chains to the concession line, between what was the first and second concessions, and that such encroachments continued westward, across 16, 17, 18, and 19, only leaving small portions of land between the water and the concession line, and that these small pieces of land were called a broken front, and the next concession which came up to them was then called the first concession. And that in that view the grant was made to Caleb Reynolds, and would embrace the premises in dispute, and cover the 528 acres which it was intended should be granted to him under that patent.

The defendant contended that the grant to Reynolds, being made in 1796, would be held to be governed by the plan, which was prepared as early as 1791, and this plan shewed a first, second, and third concession; and the plan also shewed that 16, in the first concession, had a broken front, which brought it to the waters of Burlington

Bay, and that there was a considerable portion of 16 with a broken front that appeared to be dry land, and that the D. was on the part next the shore, as well as opposite the part which was claimed by the plaintiffs as the broken front.

The copy of a letter referred to in Henry Jones's evidence from D. W. Smith, Surveyor General, to A. Jones, Deputy Surveyor, was dated Niagara, 10th May, 1796, in which he said:—"I cannot reconcile these certificates of Lieutenant Caleb Reynolds with Major Holland's plan, from which I send you a sketch, in hopes you may be able to correct the assignments if they are incorrect. Mr. Rousseaux, to whom they are transferred, observes that the broken fronts are not mentioned in the certificates; it rather appears, however, that they are included, as these broken fronts are actually in the first concession; perhaps the certificates should be amended to

Lot No. 15, 3rd concession ;

" 16, 1st, 2nd, and 3rd concessions ;

17, 1st, 2nd, 3rd, and 4th concessions ;

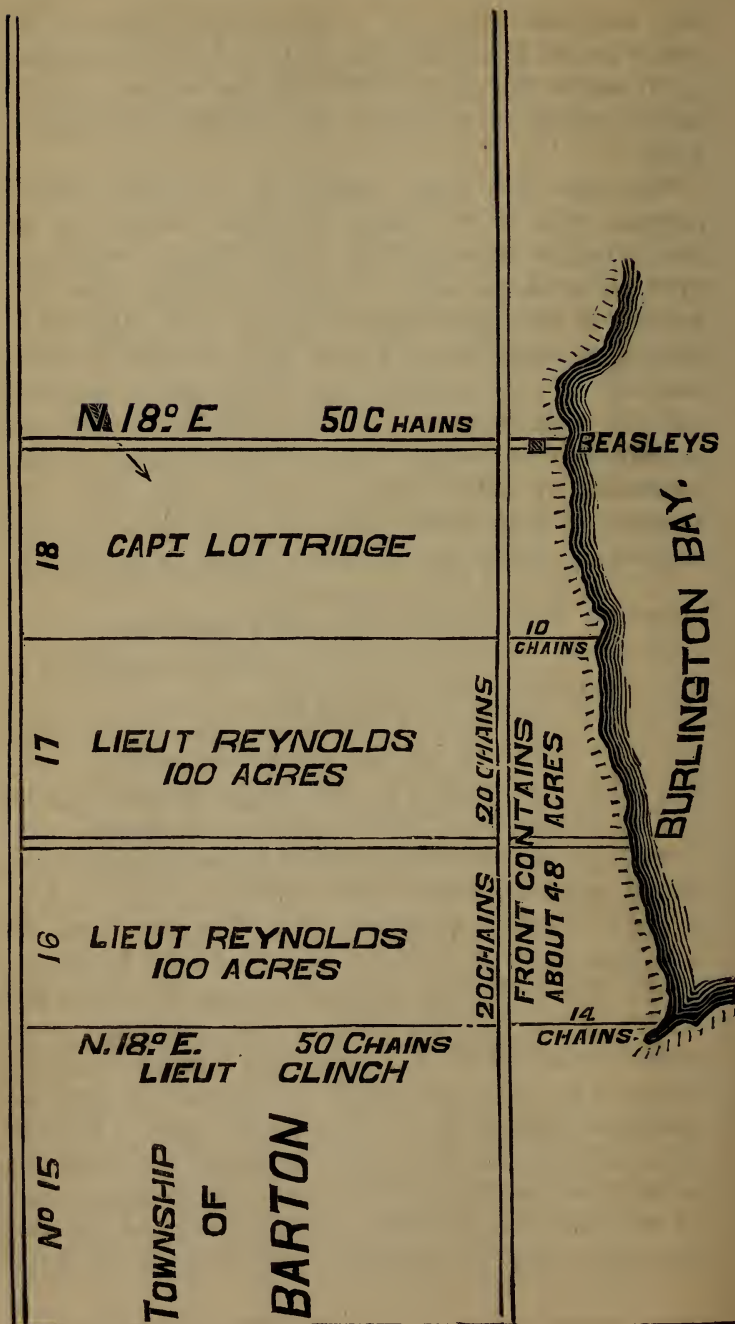
Or, Lot No. 15, 3rd concession ;

" 16, 2nd, and 3rd con., with broken front ;

" 17, 2nd, 3rd, and 4th con. with "

But of this you will be the best judge, whether of your own knowledge or the intention of the Land Board."

Amongst the field notes relative to the township was a sketch, dated 9th August, 1796, signed A. Jones, D. P. S., a copy of which is given on p. 182. This plan, it will be seen, represents the front of 16, 17, and 18, Burlington Bay. Where the line between 15 and 16 strikes the waters of the Bay, the distance from that point south to the concession road is marked 14 chains, and the course of the side line is north 18 degrees east, and the concession appears to be 50 chains in depth. The lots 16 and 17 appear to be each 20 chains wide, and the name Lieutenant Reynolds, 100 acres, is written on each of these full lots and north between them and the bay, shewing no part of 16 further north than the 14 chains



from the concession. The part marked front contains about 48 acres, that is the part in front of 16 and 17.

An extract from the description book in the Crown Lands Department was also put in, from pages 281 and 282. It was dated 8th September, 1796, and was signed by D. W. Smith, Acting Surveyor General, No. 1387. The description was the same as in the patent, except it said, "being lots 16 and 17, front or first concession; lot 16 and 17, second concession, and lot 17, third concession, together with the broken fronts of lots 16 and 17, on Burlington Bay, containing about 528 acres, with an allowance for roads."

In the margin was written in pencil on the original:

"Are lot 16 in the third concession, and 17 in the fourth concession, granted by name by this patent? They are computed by the outlines inserted in the description."

The following is the extract from the Doomsday Book, referred to in Henry Jones's evidence:—

BROKEN FRONT.			
LOT.		GRANTEES.	ACRES.
9405	{ 14 } { 15 }	Ralph Clench to John Askin.	40
	Here	the Broken Front makes a sudden turn	to the 1st Con.
1387	16 } 17 }	Lt. Caleb Reynolds.	28. This is the
	18 }	Richard Beasley, Esq.	same with the 1st
1 W.C.	19 }	(This is the same with the 1 Con.)	Con.
	20 }		50 including
1 W. C.	C. 21	Richard Beasley, Esq. This is the same with the 1 Con.	50 including 18 and 19.

LOT.		GRANTEES.	ACRES.
1ST CONCESSION.			
9405	15	Ralph Clench to John Askin	100
1387	16 } 17 }	Lt. Caleb Reynolds. 28 Acres. The 1st Con. here is a broken front.	
1 W.C.	18 } 19 }	Richard Beasley. 50 Acres included in No. 21.	{ This is only a broken front.
	20 }		
1 W.C.	21	Richard Beasley, Esq. 50 Acres in- cluded in 18 & 19.	{ This is only a broken front.
2ND CONCESSION.			
9405	15	Ralph Clench to John Askin	100
1387	16 } 17 }	Lieut. Caleb Reynolds }	200
1 W.C.	18	Richard Beasley, Esq.	100
3RD CONCESSION.			
2847	11	Robert Land	100
2849	12 } 13 }	Lt. Caleb Reynolds to Robt. Springer	200
9775	14	Daniel Springer	100
4880	15	Lieut. Caleb Reynolds	100
1387	16	Lieut. Caleb Reynolds	100
1387	17	Lieut. Caleb Reynolds	100
1835	18	Annie Morden	100
1 W.C.	19	Richard Beasley	100
4TH CONCESSION.			
1390	8	Lieut. Caleb Reynolds to the Hon. Robt. Hamilton.	100
7302	16	Aaron Krips or Creps	100
1387	17	Lieut. Caleb Reynolds	100
10.364	18	Daniel Springer	100
5TH CONCESSION.			
1390	8	Lieut. Caleb Reynolds to the Hon. Robt. Hamilton.	100

These entries shewed that the land in the description issued by the Assistant Surveyor General, No. 1,387, conveyed the five lots, with the broken fronts, as contended for by the plaintiffs.

Sixteen and seventeen, in the second concession, it will be observed, has the same number opposite it, and 16 and 17 in the third concession have also the same number opposite, and 17 in the fourth concession has that number also. Each of these lots has the name of Lieutenant Caleb Reynolds opposite.

These entries in this book were of lands granted, and were kept as a record of such land by the department.

In the return, dated in 1820, of lands by the Surveyor General to the County Treasurer of the lands in Barton described for patent, the lots in question are thus referred to :—

“8TH TOWNSHIP OR BARTON.

BROKEN FRONTS.		
LOT.	GRANTEES.	ACRES.
D 14 } D 15 }	John Askin Here the broken front makes a sudden turn into the 1st Concession.	40
D 16 } D 17 }	Lt. Caleb Reynolds.....	28, this is the same in the 1st Con.”

This return was substantially the same return as to the land in dispute as in the Doomsday Book. In August, 1806, Caleb Reynolds, late a Lieutenant in the corps of Butlers's Rangers, petitioned the Administrator of the Government, stating that he had received 1,528 acres of his military lands, and applied for the residue, which was located in Binbrook. He prayed for a grant of 472 acres to complete his quantity, 2,000 acres, as a Lieutenant in Butler's Rangers.

On 12th August, 1806, the petition was referred to the Executive Council. The acting Surveyors General were requested to report on the petition, by order of the board, on the 13th January, 1807; and they reported to James

Gore, Esq., the Lieutenant Governor, that descriptions had issued either in the name of Caleb Reynolds, or in those of his transferees, amounting in the whole to 1,828 acres, viz :

DESCRIPTION.

No. 1387, Caleb Reynolds, in Barton, under three land board certificates.....	528 acres
No. 4880, do. do. in do. under one land board certificate.....	100
	<hr/>
	628
No. 1390, Robert Hamilton, as transferee of Caleb Reynolds in do., under one land board certificate.....	200
No. 7104, do. do. as do. in Ancaster, order in council, 18th June, 1799.....	800
No. 2849, Richard Springer, as transferee of Caleb Reynolds, in Barton, land board certificate	200
	<hr/>
Total.....	1828 acres
Remains.....	172 do. to
complete his complement of 2,000.	

On 27th January, 1807, the Executive Council recommended a grant to the petitioner of 172 acres of land, being the quantity of land, according to the report, to make up the 2,000 acres as his military claim, and the report was approved by the Lieutenant Governor.

The defendant, as eldest son and heir at law of Caleb Reynolds, made his claim before the Heir and Devisee Commission for lot No. 30, in the ninth concession, 188 acres, more or less, and it was allowed him, and the same was described for patent on the 3rd November, 1830.

It was allowed to complete his father's allowance, and reference was made to the orders in council, dated the 27th January, 1807, and 25th August, 1819, Caleb Reynolds being the original nominee.

A copy of the description of lots 14 and 15, in the first and second concessions, with the broken fronts in front

thereof, to John Askin, transferred from Lieutenant Ralph Clench, was also put in. It commenced in front upon Burlington Bay, at the north east angle of said lot No. 14, in the broken front; then westerly along the water's edge 41 chains, more or less, to lot No. 16; then south, 18 degrees west, 114 chains, more or less, to the front of the third concession; then south 72 degrees east, 41 chains; then north, 18 degrees east, to Burlington Bay, at the place of beginning, containing 440 acres, more or less, with allowance for roads.

This description was signed by D. W. Smith, Acting Surveyor General.

2. A copy of the description of the lot granted to Ann Morden was also put in. It purported to be of lot No. 18, in the third concession of Barton, and the warrant was issued for it on the 11th October, 1796. The description was as follows, "commencing at a post in front of the third concession, marked $1\frac{7}{8}$; thence north 72 degrees west, 20 chains; thence south 18 degrees east, 50 chains; thence south 72 degrees east, 20 chains; then north 18 degrees east, to the place of beginning, containing 100 acres."

This lot adjoined one of those referred to in the grant to Lieutenant Reynolds, under which the plaintiffs claimed.

3. A description, dated 16th June, 1799, signed by D. W. Smith, Acting Surveyor General, was also put in. It purported to be of lots 18, 19, and 21, first concession, with broken fronts, and lot 19, second concession, in the Township of Barton, Home District, granted to Richard Beasley, Esq., "commencing on the shore of Burlington Bay, in the limits between lots 17 and 18; then south 18 degrees west, to within one chain of Ann Morden's land, 56 chains, may the distance be more or less; then north 72 degrees west, 21 chains; then south 18 degrees west, 51 chains; then north 72 degrees west, 20 chains; then north 18 degrees east, to Burlington Bay; then easterly, along the edge of the water, to the place of beginning. Also commencing in the limit between lots No. 21 and 22, on Coot's Paradise; then south 18 degrees west, to a stake at the end of a concession line, 60 chains, may it be more or less;

then south 72 degrees east, 20 chains; then north 18 degrees east, to Coot's Paradise; and then westerly along the water's edge to the place of beginning, containing about 450 acres, with allowance for roads."

4. There was a description also of John Lotteridge's lots as follows, "commencing at the south westerly angle of lot No. 19, third concession; thence north 18 degrees east, 101 chains; thence north 72 degrees west, 20 chains; thence south 18 degrees west, 101 chains; thence south 72 degrees east, 20 chains, to the place of beginning, being the lots No. 20 in the second and third concessions, containing 200 acres, with the usual allowance for highways."

These descriptions shewed that the lots granted to Askin, as the assignee of Clench, which were all in the second and third concessions, contained the proper quantity, and called for a first and second concession, with a broken front; and the map and the ground itself shewed full concessions there. These lots lie immediately east of the land in the broken front and the concession in rear of it granted to Reynolds, by the patent under which plaintiffs claim.

The description of 18 and 19, to Beasley, which adjoin, 17 and the broken fronts, on the west, referred to 18, 19, and 21 as being in the first concession and the broken front, and by the description there could be no mistake as to the locality of these lots, for Ann Morden's lot, which was granted as in the third concession, fixed the boundary of 18 in the rear, and that lot would be in the third concession if it was considered in reference to the lots on the east side of the township. But this lot in front of it in the description was said to be in the first concession.

The evidence shewed that the party who purchased from Reynolds, and those who claimed under that title, afterwards went into possession of these lots 16 and 17 in the second and third concessions, and 17 in the fourth concession, according to office plan 6, and also of the broken fronts in front of 16 and 17, as they were on the ground between the concession line and the shore of the bay.

There was conflicting evidence as to the possession of the *locus in quo*, as to whether it had been actually enclosed by a fence, but the jury found it had been in the actual possession of those who claimed under the grant to Reynolds for forty years.

In 1834, Lewis Burwell laid out lot 15, in the first concession, and the broken front, into town lots for Sir A. N. MacNab, and by that survey, a map of which was produced, the bay was said to extend on the west side from the broken front of 15 along its west side south to within about 11 chains of the concession line between the first and second concessions.

A witness, who accompanied Burwell in the survey, spoke of finding the remains of a post at the point shewn in Burwell's survey on the division line between 15 and 16, and on the shores of the bay.

Persons who had known the shore of the bay since 1812, said there was very little change in this vicinity, though further east it had been considerably washed away, and the general tendency of the evidence on that point was to shew that there never had been any considerable portion of lot 16, north of about 14 chains from the concession line, though the office plan shewed a considerable portion of No. 16, in the first concession, to extend beyond the line of the first concession, and to have a broken front between it and the waters of the bay.

The evidence rather went to shew that Jones's sketch of 9th of August, 1796, gave the more correct outline of the shore of 15 and 16 than the government plan.

There was no perceptible change of the outline of the shore in the locality spoken of until after the Great Western Railway filled in and improved that vicinity.

The defendant called two surveyors. One said, as he read Reynolds's patent, it did not cover lot 16 in the third concession, but he never made any survey on the ground. The other said the patent to Reynolds did not include 16 in the third or 17 in the fourth concession. He made the survey by measuring from the concession road between the first and second concession back, south, 50 chains. He called that

the rear of 16 in the second concession, and following from that the description would exclude 16 in the third.

The defendant himself was examined as a witness. He spoke of the land having been in the possession of Peter Hess when he left Hamilton, in 1820 ; that his house was on 16 in the second concession proper, and that 16 in the third was mostly all woods. He thought Hess had made no improvement on 16 in the third before he left. He was in Hamilton again during the rebellion. All the southern part of 16, in the third, was then pretty much all woods. His father died in 1836, and never made any claim to any of the land in the occupation of Hess or Mills that he knew of. He continued to reside in Westminster for twenty-six years after his father's death. From something he heard he was induced to make enquiries as to lot 16, in the third concession. He found that it had been located to his father, and that no patent had ever been issued for it. He made an application to the Heir and Devisee Commission, claiming it, but the application was postponed, because the Crown Lands Department refused to grant the certificate upon which the commission was to act. He said he could not say that Hess's clearing did not extend south of Main street, which was the line between the second and third concessions. He said Hess must have been living on 16, in the second concession, some three or four years before he went away, in 1820.

The learned Queen's counsel, acting as Judge of Assize, noted his views to the following effect :—

“The patent on its face calls for two broken fronts, and, as I read it, for five lots in the three concessions in rear. Owing to the deep indentation of the shore at this point of the township and for some distance further west, the broken fronts of 16 and 17, and of a number of other lots westward, as the land now lies, are in line with what to the east is the first concession of the township. This would make the three concessions next in rear of these broken fronts the second, third, and fourth concessions of the township, as those concessions are on the ground, from one to 15 inclusive, being to the east of 16, whilst the

patent describes these concessions as being respectively front concession, second concession, third concession; but the patent does not say that the concessions thus designated are the first, second, and third concessions of the township; and, as I view the matter now, the respective words *front*, *second*, and *third*, may be read as indicating the portion of these concessions from the broken front 16 and 17, or from the waters of the bay immediately in front of 16 and 17, more particularly as some of the lots to the west are patented as being in concessions which are apparently numbered according to their position from the waters of the bay immediately in front of the lots. If the conformation of the shore is now the same as it was in December, 1796, from lot 15 inclusive, westward, I should think the patent would cover lot 16 in the third concession, and 17 in the fourth, of the township, especially if the records of the Crown Lands Department shew that these lots were intended to be granted. The defendant, however, contends that the plans No. 6 and No. 7, from the Crown Lands Department, shew that lot 16 extended further north than at present, and was of the full length in the first concession proper, and had a broken front; while the plaintiffs contend that the letter of the 10th May, 1796, and the small plan of the 9th of August, 1796, from the Crown Lands Department, and the survey made of 15 by Burwell, in 1834, and the evidence of witnesses who recollect the lots for many years back, shew that the plans No. 6 and No. 7 were not correct. Defendant also contends that the special description of the lands by metes and bounds excludes 16 in the third concession proper from the patent.

The plaintiffs also contend that the entries in the Domesday Book, the entries of the name on the government plans of the township, and the returns made by the Surveyor General, in 1820, to the treasurer, all shew that 16, in the third concession proper, was part of the land intended to be granted.

He left it to the jury to say upon the evidence:

1. Whether lot 16, in the third concession proper, was one of the lots intended to be granted by the description in the patent?

2. Whether lot 16, in the third concession proper, was one of the lots taken possession of by Hess, who claimed under the patentee, and how long he and those claiming under him had been in possession of it ?

3. Whether the post referred to by Ryckman in his evidence, as being about 14 chains north from the allowance for road between the first and second concessions, on the line between 15 and 16, was an original post ; and whether the eastern boundary of 15 extended any further north than that point ; and whether Burwell's map correctly indicates the outlines of 15 as they were in 1796, and whether that point was at that time the northwest angle of 15.

The jury found :

1. That lot 16, in the third concession proper, was one of the lots intended to be granted by the description in the patent.

2. That this lot 16, in the third concession, was one of the lots taken possession of by Hess, and that he and those claiming under him had been in possession of it from 1829 to 1869.

3. That the eastern boundary of lot 16 never extended further north than 14 chains from the concession road between the first and second concessions, and that the plan made by Burwell, in 1834, correctly indicated the outlines of 15 as they were in 1796, and that there had been no material or perceptible change since, and that the point 14 chains from the concession road or front of the second concession proper was the northwest angle of 15.

On this finding the jury were directed to find for the plaintiffs, which they did.

The jury was a special jury.

In Easter Term, 1872, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection of the learned Queen's counsel, in telling the jury that, notwithstanding the title to

the land was in the Crown, if the plaintiffs and those through whom they claimed had been in possession for forty-six years, the plaintiffs were entitled to recover as against the defendant.

The rule was enlarged until Michaelmas Term, 1872, when *Burton*, Q. C., shewed cause. There was no ruling as to the forty years' possession. If the defendant's contention is allowed to prevail, the quantity of land which the grant calls for will be very much diminished. The quantity is descriptive, and may well aid in ascertaining the grant: *Mann v. Pearson*, 2 Johns. 37, 41; *Perkins v. Webster*, 2 N. H. 287; *Thorndike v. Richards*, 13 Maine 430. The entries in the Domesday Book, the description from the Crown Lands Office, the returns to the County Treasurer, the entries of the names on the plans, and the quantities, 100 acres, in each lot, and the 28 acres in the broken fronts, shew beyond all doubt what was intended to be granted. In the grants to Beasley the second concession is mentioned as the first concession, and that his grant covers the land in the second concession proper, though called the first, is shewn by its running back to Ann Morden's lot, which is described as in the third concession. There was no objection to the reception of this evidence: *Taylor on Ev.*, 6th ed., 1082, 1083; *Attorney General v. Drummond*, 3 Dr. & War. 165, 2 H. L. Cas. 837. If the evidence were not receivable, the particular description by metes and bounds would govern: *Taylor on Ev.*, 6th ed., 1105; *Doe d. Smith v. Galloway*, 5 B. & Ad. 43; *Dyne v. Nutley*, 14 C. B. 122; *Doe v. Hubbard*, 15 Q. B. 227, 327; *Doe Campton et ux. v. Carpenter*, 16 Q. B. 181. The defendant is estopped by the act of his ancestor, and at all events has no merits.

M. C. Cameron, Q. C., contra. The land is mentioned in the declaration as 16 in the third concession, and that is not mentioned in the Government patent. The words used in the first part of the deed must govern. The intention can only be determined by the language in the patent. When the title is in the Crown no stranger can bring ejectment

because he had a former possession. A stranger may set up the title of the Crown against an action brought against himself. [RICHARDS, C. J.—Will forty years' possession bar the Crown ?] No. [WILSON, J.—The Crown is not barred except by statute.] As to the right to set up Crown title : *Jamieson v. Harker*, 18 U. C. R. 590 ; *Dowsett v. Cox*, *Ibid*, 594 ; *Doe d. Wilkes v. Babcock*, 1 C. P. 388 ; *Stewart v. Murphy*, 16 U. C. R. 224 ; *Johnson v. McKenna*, 10 U. C. R. 520 ; *McDonald v. Prentiss*, 14 U. C. R. 79 ; *Doe d. Campbell v. Crooks*, 9 U. C. R. 639 ; *Regina v. Bishop of Huron*, 8 C. P. 253.

RICHARDS, C. J., delivered the judgment of the Court.

It was not objected at the trial that the evidence offered on behalf of the plaintiffs, or any of it, ought not to have been received. Much of the documentary evidence and the plans were, undoubtedly, properly given in evidence with a view of ascertaining where the place of beginning was which was mentioned in the grant.

It was necessary to ascertain where the north west angle of No. 15, on Burlington Bay, was ; and the parol evidence, together with the map of lot 15, as laid out into town lots in 1834 by Mr. Burwell, and the sketch of the locality furnished by Jones in August, 1796, were strong, if not absolutely conclusive evidence, that that point was about 14 chains north of the concession line proper, and on the division line between lots 15 and 16.

This, then, being satisfactorily established, the next question is, what does the deed mean ? What was the intention of the Crown in making the grant ?

The words are, "and by these presents do give and grant unto Lieutenant Caleb Reynolds, and his heirs and assigns forever, a certain parcel or tract of land situate in the Township of Barton, containing by admeasurement 528 acres, with the usual allowance for roads, be the same more or less."

If the patent had then said, "butted and bounded as follows," and then proceeded to describe the land as in the

patent, there can be no doubt that the lots contended for by the plaintiffs would have passed to the grantee.

The patent then proceeds: "being composed of lots Nos. 16 and 17, front concession, 16 and 17, second concession, and 17, third concession, with the broken fronts of 16 and 17, on Burlington Bay, and situate, lying, and being in the Township of Barton aforesaid, in the County of Lincoln, and Home District, of our Province aforesaid, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed, which said 528 acres of land are butted and bounded, or may be otherwise known as follows, that is to say, beginning," &c.

Suppose the object had been to grant 228 acres, and the description had been: "being composed of lots 16 and 17, front concession, with the broken fronts of 16 and 17, on Burlington Bay," and the description had been, "beginning at the northwestern angle of lot No. 15, on Burlington Bay; then south 18 degrees west, 65 chains; then north 72 degrees west, 41 chains; then north 15 degrees east, to Burlington Bay, and then easterly along the bay to the place of beginning," would there be any doubt that the lots 16 and 17, in what is now called the second concession proper, would have passed by the grant? Would not the inevitable inference be that the Crown at that time, and in that locality, meant to call that portion of the township, which is now said to be the second concession proper, the front or first concession; and if so, looking at the surrounding circumstances, did they not mean in that grant to call that part of the concession next in rear of those lots the second concession, and the next one further north the third?

Courts of Justice are always inclined to construe deeds so as to give effect to the intention of the parties, and where it appears from the instrument itself and the surrounding circumstances what that intent really was, they reject that which would be inconsistent with the true intent.

As between private parties, their conduct in relation to

the grant is referred to to shew the interpretation they put upon it.

In *Doe dem. Gildersleeve v. Kennedy*, 5 U. C. R. 402, the late Sir J. B. Robinson gives a very elaborate judgment on the construction of a deed, and in the course of it he makes the following observations, at page 411:—"From 1837 to this time, the government had never, as it appeared, asserted any right to the 141 acres in question, or given any proof that they imagined themselves to be the owners of it; and if contemporaneous construction is a material point to be considered, even in giving effect to acts of parliament, the conduct of the parties is no less material as throwing light upon their own understanding of their contracts. The evidence that the land is in the same state now as it was at the time of the conveyance was clearly admissible; for all deeds are to be construed with relation to the subject matter, and if possible so as to effectuate the intention of the parties. It is said the best way to expound a description is to read it on the land; and a late writer remarks, 'that evidence that the parties were in the same situation as to boundaries at the date of the deed, as they are now, is not, (it is apprehended), that sort of prohibited evidence which cannot be received, because it merely proves that there has not been any alteration in the parcels, and that the construction of the deed should, with reference to the subject matter of it, be the same as it was on the day it was executed: *Coventry on Conveyancer's Evidence*."

Now here, for three quarters of a century the government have never asserted any right to this land or given evidence that they considered themselves the owners of it. On the contrary, the department have always assumed that it passed under the grant to Caleb Reynolds.

The very description furnished by the Surveyor General, on which to make out the patent, says, "being lots 16, and 17, front *or first* concession, lots 16 and 17, second concession, lot No. 17, third concession, together with the broken fronts of lots 16 and 17, Burlington Bay."

The plan furnished by Jones on the 9th August, 1796, shews these broken fronts, and they contain about 48 acres. The other five lots are marked on the plan as containing 100 acres each, thus covering the 528 acres called for by the patent.

All the plans in the Crown Lands Department shew the name of Caleb Reynolds marked on the lots which the plaintiffs contend passed by the patent.

The Doomsday Book and the return to the treasurer all shew that the government considered they had already granted these lots.

The party to whom the grant was made, and those claiming under him, have dealt with the land, occupied it, sold it, and laid it out in city lots, assuming almost from the very day of the grant down to the present time that the 528 acres passed under it. And this state of things existed for more than half a century, before any one suggested a doubt as to the land having been conveyed to Reynolds; and now his eldest son and heir at law asserts that the Crown did not do what it intended to do with this particular lot, and that, therefore, he has a right to keep possession of it, though the Crown asserts no title whatever. It seems to me it would be a reproach on our law if so absurd a proposition could be maintained.

I think we may fairly construe the second and third concessions in the description of the land in reference to the front or first concession, which the deed itself seems to me, undoubtedly, to shew was the second concession according to the plan No. 6, east of lot 15. In this way we reconcile the grant with the grant to Beasley, and make it cover the 528 acres.

If, on the contrary, we begin at what the jury consider the proper place, and the construction contended for by the defendant were to prevail the deed would only cover 16 and 17 in the first concession, 16 and 17 in the second and 17 in the third concession proper, but as the first concession is only a broken front, the land comprised within that description would contain only 328 acres and the requirement of the grant as to a broken front would not be satisfied.

If the place of beginning is carried out so as to be further north than the northern line of the first concession proper, and then is limited as last mentioned, there would in fact be just the same deficiency as already mentioned, though nominally it might seem to cover 16 as a full lot, for the portion of No. 16, north of the proper point of commencement, as found by the jury, is, and was at the time of the grant, covered with water.

In section 1105 of *Taylor on Evidence*, 6th Ed., p. 1056, some of the cases are referred to where the Courts reject part of the description as immaterial. "If a landlord, having but one house in a street, were to describe it in a lease by a wrong number, and then let a tenant into possession under it, he could not afterwards rely on the error, and contend that no interest had passed; for the number would be rejected as an immaterial part of the description." See also *Hutchins v. Scott*, 2 M. & W. 816, per Lord Abinger; *Hitchin v. Groom*, 5 C. B. 515. In the argument in *Hutchins v. Scott*, counsel said that evidence was admissible to shew that the parties in speaking of No. 35 called it No. 38, 35 being the correct number. And so, where land was described in a patent as lying in the County of M., and further described by reference to the natural monuments, and it appeared that the land described by the monuments was in the County of H., and not of M., that part of the description which related to the county was rejected, and it was said "The entire description in the patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls of the patent clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void": *Boardman v. Reed and Ford's Lessees*, 6 Peters, 328, 345, per McLean, J.

"Again, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to one description, and not

to the other, the description of the lands which he owned will be taken as the true one, and the other will be rejected as *falsa demonstratio*." *Taylor on Ev.*, 6th ed., sec. 1105, p. 1057.

Loomis v. Jackson, 19 Johns. 449; *Lush v. Druse*, 4 Wend. 313; *Jackson v. Marsh*, 6 Cowen 281; *Worthington v. Hylyer*, 4 Mass. 196; *Blague v. Gold*, Cro. Car. 447; *Swyft v. Eyres* *Ib.* 548, are referred to in the note to section 1105, which proceeds further, "The object in cases of this kind is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give most effect to those things about which men are least liable to mistake: *Davis v. Rainsford*, 17 Mass. 210; *McIver v. Walker*, 9 Cranch 178."

On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled in America. First, the highest regard is to be had to natural boundaries; secondly, to lines actually run and corners actually marked at the time of the grant: thirdly, if the lines and courses of an adjoining tract are called for, the lines will be extended to them if they are sufficiently established, and no other departure from the deed is thereby required, marked lines prevailing over those which are not marked; fourthly, to courses and distances, giving preference to the one or the other, according to circumstances: *Cherry v. Slade*, 3 Murphy 82; *Dogan v. Seekright*, 4 Hen. and Munf. 125, 130; *Preston v. Bowmar*, 6 Wheat. 580; *Loring v. Norton*, 8 Greenl. 61; *Flintoff* on Conveyancing, 537, 538.

Words necessary to ascertain the premises must be retained, but words not necessary for that purpose may be rejected, if inconsistent with the others: *Worthington v. Hylyer*, 4 Mass. 205; *Jackson v. Sprague*, 1 Paine 494; *Vose v. Handy*, 2 Greenl., 322.

The expression of quantity is descriptive, and may well aid in finding the intent when the boundaries are doubtful; *Mann v. Pearson*, 2 Johns. 37, 41; *Perkins v. Webster*, 2 N. H. 287; *Thorndike v. Richards*, 13 Me. 430.

In *Taylor on Ev.*, 6th ed., secs. 1090, 1091, pp.

1043, 1044, reference is made to cases where it has been held that the acts of the parties may be referred to, to aid the Court in construing a grant.

I have not found any case expressly deciding that when a party has been in possession of land for forty or fifty years, and that possession is intruded on by a mere stranger, not in any way claiming under or by privity with the Crown, that he can in ejectment shew that the land has never been granted by the Crown, and that therefore, the action cannot be maintained.

The language used in the cases is, that the Statute of Limitations does not run against the Crown, and so cannot be set up against the grantee of the Crown. But where the person who has had the possession is there with the privity of the Crown, trespass, it appears, will lie against a mere intruder on the land.

Harper v. Charlesworth, 4 B. & C. 524, establishes this, though it is there suggested that ejectment will not lie, because the party in possession, though with the privity of the Crown, could not make a lease. Whether our Ejectment Act would make any difference it is not absolutely necessary here to decide.

On a proceeding on behalf of the Crown to recover possession against a party who has held for over twenty years, the defendant would not be bound to plead or shew title in himself, but the Crown would be obliged to prove a title against him, under the provisions of the Statute of 21 James I. ch. 14.

If trespass had been brought against the defendant, I should think there was evidence to go to the jury to have maintained the action, under the authority of the case in 4 B. & C.

We think, under the evidence given on the trial and the finding of the jury, the verdict can be sustained without our deciding expressly that the forty years' possession would enable the plaintiffs now to maintain ejectment.

Rule discharged.

LAKE SUPERIOR NAVIGATION COMPANY V. BEATTY ET AL.

C. L. P. Act, sec. 68—Misjoinder of defendants—Amendment at trial—Proof of ownership of vessel.

Defendant's vessel having got on the shore, the plaintiffs' vessel, the *Manitoba*, took off her passengers and freight and conveyed them to their destination, upon an order to do so signed by the purser of defendants' vessel. In an action for the services so rendered, the plaintiffs proved orally that the four defendants sued owned the *Manitoba*. One of the defendants was then called, and swore that another defendant, W. B., Jr., had ceased to have any interest in the *Manitoba* when the services were rendered, though he was still a registered owner. The name of this defendant was then struck out. No certificate of registration was produced.

Held, 1. That under the C. L. P. Act, sec. 68, the amendment was authorized; and that the name of a defendant improperly joined may be struck out without his consent, and even against his express objection.

Held, 2. That the oral evidence of ownership was admissible, and that it was not necessary to produce the certificate; for, assuming that in actions by or against owners of a registered vessel as owners the ownership must be proved by the certificate, yet the mere ownership may not create a liability, and defendants may be liable apart from it under a contract made by their agent, as in this case by the purser.

Semble, that the objection was not open to defendants after their proof, without production of the certificate, that W. B., Jr., had ceased to be owner.

THE declaration contained counts for freight, primage, and average, for conveyance by the plaintiffs for defendants of goods at their request, in ships, for demurrage; and the common money counts.

The pleas were, never indebted; payment; and set-off, excepting as to \$357, which was paid into Court.

Issue was taken on the pleas, and the plaintiffs traversed that the \$357 paid into Court was sufficient to satisfy the claim in respect to which it was pleaded.

The cause was tried before Galt, J. at Whitby, at the Fall Assizes of 1872.

The evidence given was to the following effect:—

Edward M. Carruthers, the Secretary of plaintiffs' Company, stated that in the summer of 1872 the steamer *Manitoba*, which sailed from Sarnia for Fort William, got on shore on the island of Michipicoton. She had a number of passengers and some goods on freight. The steamer

Cumberland was called to her assistance, and got the Manitoba off the shore. The captain found she was sinking; she was then beached, and the Cumberland took off from her the goods and passengers.

The freight charged was.....	\$173.00
And for passengers.....	665.25
	<hr/>
Making a total of.....	838.25
The Cumberland collected.....	304.17
	<hr/>
Leaving a balance.....	\$534.08

The purser of the Manitoba gave an order in favor of the purser of the Cumberland to carry the passengers, the rates to be arranged afterwards. Nothing was said of freight. No charge was made for services rendered.

The witness did not know the names of the owners of the Manitoba. He knew only the name of the firm of owners. James Beatty, Henry Beatty, and William Beatty sued the plaintiffs for services rendered for plaintiffs last year. A tariff of charges was agreed to by the owners of the steamers Cumberland, Frances Smith, and Chicora, for 1872.

Charles Perry, the manager of the plaintiffs' company, spoke as to the tariff. He said also James H. Beatty, H. Beatty, W. Beatty, Jr., and W. Beatty, Sen., were the owners of the Manitoba. They were the same parties that sued the plaintiffs last fall, and it was because they were the persons who sued the plaintiffs that he thought they are the owners. He never saw the register of the Manitoba.

This was the case for the plaintiffs.

The defendants' counsel then moved for a nonsuit, because it was not shewn the defendants were the owners of the Manitoba, and because the certificate of registry had not been produced to prove that fact.

Leave was reserved to defendants to move on that point.

For the defence, *Anthony Dunlop*, the purser of the Manitoba, said, there was an arrangement made between him and the purser of the Cumberland as to the freight;

the witness was to hand to the purser of the Cumberland the manifest, and the owners of the Manitoba were to look to him for the amount of freight charges. There was no arrangement that the plaintiffs were to have any claim against the Manitoba for freight.

In cross-examination he said: He knew James Beatty and H. Beatty were part owners. He had no belief as to W. Beatty, Sen., being an owner, and he never saw W. Beatty, Jr.

James H. Beatty, one of the defendants, said the owners of the Manitoba at the time of the occurrence were himself, Henry Beatty, and W. Beatty, Sen. He had appointed the officers for that year. W. Beatty, Jr., had ceased to be a partner since the January preceding.

In cross-examination he said: William Beatty, Jr., is still a registered owner; he has not executed any deed for his interest yet; he had no interest whatever.

On motion of the plaintiffs' counsel, the learned judge struck out the name of W. Beatty, jr., from the record, subject to the payment of such costs as might have been incurred by his having been made a party.

The learned Judge then charged the jury that there was no question of law involved, and they must assess the damages as they understood and construed the evidence.

In Michaelmas Term, 1872, *M. C. Cameron*, Q. C., obtained a rule, calling on the plaintiffs to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved; or, why the verdict should not be set aside and a new trial had between the parties, the verdict being contrary to law and evidence, for misdirection, and the reception of improper evidence, and for the improper amendment of the record at the trial by striking out the name of the defendant, W. Beatty, jr., without his consent; which said misdirection was in telling the jury that there was evidence of the joint liability of the defendants for their consideration, and which improper reception of evidence was in admitting

that evidence of the ownership of the steamer "Manitoba," and not requiring the certificate of ownership and registration, or other written evidence of ownership.

In Easter Term last, *Harrison*, Q. C., and *Duggan*, Q. C., shewed cause. *Chisholm v. Potter*, 11 C. P. 165, shews that when a vessel is not registered it may be sold as an ordinary chattel. See also *Scatcherd v. The Equitable Fire Insurance Company*, 8 C. P. 415. For all that appeared, the vessel might have been foreign and required no registration: *Smith v. Jones*, 5 C. P. 425; and if a vessel be not shewn to be registered, it must be assumed she has not been registered. The register, or an examined or certified copy of the register, although admissible in evidence as *primâ facie* proof of all the matters contained or recited in the register, under sec. 107 of the Imperial Act, 17 & 18 Vict. ch. 104, is not proof at all in a case of this kind, which is one of contract: *Frost v. Oliver*, 2 E. & B. 301; *Mitcheson v. Oliver*, 5 E. & B. 419; *Myers v. Willis*, 17 C. B. 77; *Brodie v. Howard*, 17 C. B. 109; *Stapleton v. Haymen*, 2 H. & C. 918; *Hibbs v. Ross*, L. R. 1 Q. B. 534; *Pearson v. Nell*, 13 W. R. 967. The case of *Wilson v. Cameron*, 22 C. P. 198, is a decision under our own Statute, Consol. Stat. C., ch. 41; there it was held that the registered owner, who had sold by bill of sale, which was not registered, could maintain an action in his own name against a person who had carelessly run his vessel into her and injured her, although the actual vendee, by reason of his possession of the ship, might also have maintained the action.

It was also contended for the defendants that the name of one of the four who were sued was improperly struck out at the trial. That was done under the C. L. P. Act, secs. 65, 68, and was rightly done: *Johnson v. Goslett*, 18 C. B. 728; *Greaves v. Humfries*, 4 E. & B. 851; *Burritt v. Hamilton*, 17 U. C. R. 443; *Judge v. Thompson*, 29 U. C. R. 523; *McKee v. Joli*, 20 C. P. 516; *Blake v. Done*, 7 H. & N. 465; *Wickens v. Steel*, 2 C. B. N. S. 488; *Knowles v. Lister*, 17 L. T. N. S. 618; *Rennison v. Walker*, L. R. 7 Ex. 143. If the Judge

had power to strike out the name, the Court will not interfere with the discretion he has exercised: *Holden v. Ballantyne*, 6 Jur. N. S. 451. The Court may restore the name if there is evidence to maintain the action against him, and if the Judge had no power to strike it out: *Petrie v. Tannahill*, 22 U. C. R. 608. An amendment by adding parties was allowed in ejectment: *Ogilvie v. McRory*, 15 C. P. 557.

M. C. Cameron, Q.C., supported his rule. There was no evidence to bind the four defendants as owners. The certificate of the register should have been produced, as the only legal evidence of ownership to charge the defendants with liability: *Bochus v. Shaw*, 8 C. P. 391; and that case also shows that the name of the defendant should not have been struck out. The purser had no power to bind the defendants.

WILSON, J., delivered the judgment of the Court.

It was admitted on the argument that some objections had been taken at the trial to the learned Judge's direction which did not appear on the notes, and it was agreed the defendants should have the like benefit as if the same had been duly noted.

Perhaps an objection was taken against the amendment made in the defendants' names, that no consent had been given to the removal of the name. If such an objection had been made, we do not think it could have prevailed, even in the absence of a consent.

In the case of plaintiffs, one or more of them may be struck out, if it appear the misjoinder were not for the purpose of obtaining an undue advantage, and that injustice will not be done by the amendment, and that the person or persons to be struck out was or were originally introduced without his or their consent, or that such persons consent to have their names struck out.

In the case of defendants, "Such misjoinder may be amended as a variance at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended."—C. L. P. Act, sec. 68.

In the English cases the amendments seem always to be made without the consent of the defendant being asked for or given. That must be because the provision as to a plaintiff being struck out is upon the condition that he was originally made a party without his consent, or that he consents to the removal of his name; and such provision is inapplicable to a defendant, who is in every case made a party originally without his consent, and who would never give or be likely to give his consent to be removed from the record for the purpose of serving the plaintiff; or it must be on the ground that the presumption is, that the defendant, whose name it is proposed to remove, was made a party originally without his consent, and so it does appear to the Judge at the trial that such was, in fact, the case.

However that may be, the consent is in practice neither asked nor given, and we think there is good reason for the practice if effect is to be given to the substance of the enactment in the case of defendants.

The cases of *Burritt v. Hamilton*, 17 U. C. R. 443, and *Ogilvie v. McRory*, 15 C. P. 557, are cases in which a consent is referred to. In the first of these cases the learned Chief Justice seemed to think a consent was required; in the last no opinion was expressed upon it.

In *Johnson v. Goslett*, 18 C. B. 728, 736, counsel mentioned that the defendant could be removed only with his consent. The Court made no observation upon it; but in that case the removal of the names, instead of being by consent, was made in the face of an objection to it.

I think it must be considered that in the case of a defendant, he may be removed from the record without his consent, and even although he expressly object to it.

Then as to the necessity of producing the register or the certificate of it, in order to prove who the persons are who are to be held liable for the claim in this case.

If it were not for our own statute, and if the case had to be determined by the Imperial Act 17 & 18 Vic. ch. 104, the cases which have been cited shew quite plainly that the register is of very little consequence in settling the

liability of parties upon contracts; that the mere fact of ownership does not create a liability; it requires a contract, express or implied, to be proved against the person or persons who is or are sought to be made liable. And therefore a registered part owner is not liable for repairs unless it be proved he agreed to become liable: *Mitcheson v. Oliver*, 5 E. & B. 419.

In that case, it is quoted from *Abbott* on Shipping: "The owners here spoken of are not in all cases the persons in whom the absolute legal title of the ship may be vested, but rather those from whom the master derives his authority, and whose agent he is on the particular occasion."

A person who induced another to believe that the master was acting for him would be liable, whether the master had authority or not to bind him. But if the legal owner were to lease the ship to another, who appointed the captain and crew, the lessee would be the only person who could be liable on the master's contracts: *Ibid.*

In *Myers v. Willis*, 17 C. B. 77, the registered owner was held not to be liable on the master's contracts. The legal title was in him as owner, but the bill of sale of the vessel was a security and mortgage only, and he had given no power, in fact, to the master to contract or act for him in any way.

It is there said by counsel, p. 100, citing from *Chinnery v. Blackman*, 3 Doug. 391, 395, "It is now decided that the mere legal ownership of the vessel does not make the party liable for the ship's debts; and the proper question in such cases is, were the repairs done or the goods supplied on the credit of the legal owner?"

Jervis, C. J., added, p. 101, "That was the law as generally understood at that time. It was afterwards altered. But now the original notion is very properly revived. The Registry Acts are now considered as having been enacted *alio intuitu*, for the regulation of the mercantile marine. This is a question of contract." And in giving judgment he said, p. 103, "It is now well understood that we are not

bound by the register, but may look at the real transaction between the parties, in order to ascertain whether that which appears to be a legal title in a particular person,—the person registered as owner,—is or is not a legal title.”

The case of *Brodie v. Howard*, 17 C. B. 109, is to the same effect.

In *Stapleton v. Haymen*, 2 H. & C. 918, it was held that the unregistered purchaser of a registered vessel could maintain trover for the ship against the assignees in bankruptcy of the vendor, who stood as the registered owner.

What effect then has the Consol. Stat. C. ch. 41, upon the Imperial Act, 17 & 18 Vic. ch. 104?

The Consolidated Act is a consolidation of the 8 Vic. ch. 5 chiefly. The Imperial Act was passed long after it.

“The consolidated statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory of the law as contained in the said Acts, and parts of Acts so repealed, and for which the said consolidated statutes are substituted.” Consol. Stat. U. C. ch. 29, sec. 8.

Whether that has re-enacted or revived any provision before the consolidation altered or repealed it, it is not necessary to say. The Imperial Act and the Consolidated Statute may stand together, for they are not in conflict.

Our own Act, which is the same as the former English Acts, 3 & 4 Wm. IV., ch. 55, and 8 & 9 Vic. ch. 89, declaring that ships after certificate of ownership has been granted, “shall be transferred by bill of sale or other instrument in writing containing a recital of ownership, * * otherwise such transfer shall not be valid for any purpose either at law or in equity.” Consol. Stat. C., ch. 41, sec. 13. And that “no bill of sale shall pass the property in any ship, * * or have any other effect, until it has been produced to the collector at the port (of registration,) * * and entered on the book of registry of ownership,” (*Ib.* sec. 16), differs so far from the Imperial Act ch. 104, that it continues the negative enactments just noted, which have been omitted from the Imperial Act, ch. 104.

Under the latter Act, the property in a ship passes by a bill of sale, although it has not been registered, as against the vendor and those claiming by representation under him, as his assignees in bankruptcy; although the unregistered vendee cannot transfer a legal title to another, and he is liable to be cut out by his vendor selling to a third person, who makes a prior registration: *Stapleton v. Haymen*, 2 H. & C. 918.

While under the former English Acts, from which ours has been taken, a bill of sale not registered was held to pass no property in the ship, even against the assignees in bankruptcy of the vendor: *Boyson v. Gibson*, 4 C. B. 121.

The case of *Wilson v. Cameron*, 22 C. P. 198, is well supported, which determined that the registered vendor might sue for an injury done to the ship, although he had made a bill of sale which was not registered.

But it was there said, the unregistered purchaser could also have maintained the action by reason of his actual possession.

The Liverpool Borough Bank v. Turner, 1 J. & H. 159, 2 DeG. F. & J. 502, is to the same effect.

Assuming then that property in a registered ship does not pass till a bill of sale has been made of it, and has been duly registered, and that in all actions by or against the owners, *as owners*, it is necessary to prove the ownership as constituted in the only legal way in which the law allows it to be constituted, namely, by the bill of sale, as evidenced by the certificate of registration under the statutes,—such as in an action of trover by the owners, for conversion of the ship; or in a action against the owners for a collision; and in some cases on contracts, as in an action by the owners, as in this case, for services rendered or the like—it does not follow that a defendant or defendants may not be liable to be sued upon a contract made by him expressly, or by implication, or by his agent, the master, for him, as the owner or owners of the ship, although in fact he or they may not be the actual legal holder or holders of it.

The case of *Mitcheson v. Oliver*, 5 E. & B. 419, which

was a decision on the law as it was before the 17 & 18 Vic. ch. 104, and the passage there contained (p. 441), from *Abbott on Shipping*, shew clearly there may be a liability altogether apart from the fact of actual legal ownership.

The Purser of the *Manitoba* requested by writing the purser of the *Cumberland* to "pass our passengers from Michipicoton to destination, * * the rates to be arranged hereafter." It was a matter of evidence for whom the purser of the *Manitoba* acted. He acted for the Steamer.

Then it was stated by one of the defendants called for the defence who the owners were, and that he had appointed the officers for that year.

There might have been a question whether there was evidence sufficient to charge more than the defendant James H. Beatty, who had appointed the officers for that year, and whose agent the purser certainly was, although the certificate of registry had been produced. It might have been shewn that the other part owners were all assenting parties to the boat being officered and managed as she was; as no doubt, in fact they were, otherwise it would have been stated. Or some other circumstances might have been shewn to have established that all the defendants, or such of them as were owners, or that it was sought to make liable, were liable as contractors, which might easily been done.

But no such question was made.

It was rather assumed that if the ownership were strictly established, the liability was complete. And the question was whether the ownership could be established otherwise than by production of the certificate of registry.

We are of opinion it may, in a case of this kind.

The defendants should not properly have been allowed to raise this question, for they called one of the defendants and got from him the names of the owners, without producing the certificate of registry. That was done for the purpose of shewing that one of the four sued was not an owner, and of getting a verdict or nonsuit; but entering into that evidence destroyed the defendants' right to complain of

the plaintiffs having done so. The defendants established the fact that three of the four defendants were owners, and were therefore liable according to the view taken at the trial, and the plaintiffs accepted of that proof, and got rid of the objection which it raised by striking out the name of the one who was not an owner.

Upon the evidence, and on the ground on which the case was put, the plaintiffs were entitled to recover against the three actual owners, or against all four registered owners; for all four defendants were proved by the evidence of one of the defendants for the defence to be the registered owners. On the merits the plaintiffs should succeed.

It should also be noted, that there is as much force in the plaintiffs' objection that it was not strictly proved the ship was a registered ship, in which case the title to it is of the like nature as that of any other chattel: *Chisholm v. Potter*, 11 C. P. 165—as in the objection of the defendants, that the registered title was not shewn; or more weight in it, for the plaintiffs could not be called on to prove a registration, until it was shewn there was one to be proved.

The rule will be discharged.

Rule discharged.

VICARY V. KEITH.

Negligence—Contradictory evidence—Nonsuit—Dangerous machinery.

The plaintiff, a boy of twelve, in the employ of defendant, was left with two other boys to attend to a flax scutching machine. He had never attended to the machinery before, and he said that he received no instructions. The two boys were sent away, and the plaintiff, in attempting to replace a roller, which frequently came out of its place, had his arm crushed in some cog-wheels which were not covered. These wheels were on the opposite side of the machine from where the plaintiff was required to work, and the roller could readily have been replaced without going near them. The plaintiff further said that he put the roller on as he had seen the boys do it, and that he had not been warned not to go near the cog-wheels. The defendant's evidence, on the other hand, shewed that the plaintiff had been distinctly warned; that the other boys had not placed the roller on as plaintiff did; and that the plaintiff had been shewn how to put it in. It also appeared that the machine had been in use several years without an accident, although boys had constantly been employed about it.

Held that there was evidence to go to the jury, if the plaintiff's statements were true, and a nonsuit was set aside.

DECLARATION.—First count: That the plaintiff was employed by the defendant to do certain work for the defendant, about a certain flax mill belonging to the defendant, upon the terms that defendant should use due and ordinary care not to expose the plaintiff to excessive danger and risk in the course of his said service, yet defendant did not use due and ordinary care not to expose the plaintiff to excessive danger and risk in his said service, and by the negligence and improper conduct of defendant the plaintiff, in the course of his said employment, had one of his arms entangled and caught in part of the machinery of defendant's mill, and his arm was thereby much torn and lacerated, and has been rendered useless to the plaintiff, who has incurred expense for medical and surgical attendance in endeavoring to cure his said arm.

Second count: that before committing the grievances hereinafter mentioned defendant carried on the business of dressing and milling flax, and the plaintiff, being an infant, to wit, of the age of twelve years, was employed by him in the said business, on the terms, amongst others, that defen-

dant would take and use all due and reasonable and proper means and precautions in order to prevent accidents, damages, or injury, or unreasonable or unnecessary risks or danger, from happening or occurring to the plaintiff in the performance of his duty as such servant of the defendant ; yet defendant did not take and use such due and reasonable and proper means and precautions, and by reason thereof, and of the default and neglect of duty of the defendant in that behalf, the plaintiff was directed and employed by the defendant, as such his servant, to perform work on a certain machine called a scutching machine, which, for want of such due means and precautions, was constructed unsafely and insecurely, and was in such a condition as rendered it unsafe for the plaintiff to work thereat, as the defendant well knew, but of which the plaintiff, was wholly ignorant ; and in consequence thereof the plaintiff, while engaged in working for defendant as aforesaid, had one of his arms caught in the said machine, and the flesh thereof torn and bruised, &c.

Pleas : 1. To first count, not guilty ; 2. To same count, that the alleged injury was caused by the negligence and improper conduct of the plaintiff, and not otherwise.

3. To second count, not guilty ; 4. To second count, the same as the second plea to the first count.

The cause was tried before Wilson, J., at the Spring Assizes at St. Thomas.

From the evidence it appeared that the plaintiff was twelve years old in August, 1872, and this accident occurred in November, 1871. He had been in the plaintiff's employ about two months, but was not working about the machinery. Defendant had at times forty boys working about the place in connection with his business of dressing flax. The plaintiff was first employed for a month in handing bundles of flax to the threshers, and sometimes in spreading the flax. He had nothing to do with the machinery.

He was examined as a witness on his own behalf. He stated, that on the morning of the accident he was directed

to pull away the tow, that is, flax after it had gone through the scutching machine; two other boys helped him; they were sent away and he was left alone; there was a wooden roller on the scutching machine which frequently was thrown out of place, and he went to put it in; the machine caught his coat and drew him in, and the accident happened. He heard Mr. Craigie, who was working at the machine, hallo; he did not hear what he said; he was calling to him, and he went to put in the roller as he had seen the other boys put it in; the machine took the flesh off his arm and he was seriously injured. He said, he had had no caution about the machinery; the cogs which caught him were not covered; defendant had since got a new machine, which is covered; he, plaintiff, had never before worked at machinery; Craigie had been with defendant about a month, and took charge of the machine; Craigie was feeding the machine at one end, and plaintiff was taking the flax away from the other end; his work was light, taking the flax away from the machine and laying it away; the roller never came out before when he was at the machine; he had to stoop down to get under the driving belt, to get to the place where the roller had to be put in; he had, before this, moved to the south or left-hand side of the machine (where the wheels were not covered, though they were covered on the other side), and used a fork to remove the flax from the discharge-table; one Shields and John Craigie were about at the time; Shields did not call to him not to put the roller in, nor did Craigie. The roller had run out once or twice before that on the same day, and plaintiff said he saw the other boys put it in; the roller was of light wood, lying in sockets, not secured; he did not think he was in danger in doing what he did; the cog-wheel was under his arm when he was dropping the roller into its place; the machine defendant got afterwards was of a different make.

A witness was called, who said he was accustomed to all kinds of machinery; he saw the machine at which the boy

was injured, and the new one that was in its place ; the cogs that caught the boy should have been covered ; in the new machine they were covered ; there was no difficulty in covering them.

In cross-examination he said, the new machine might be one of a different construction ; he noticed it was covered over at the cogs, and the old one was not ; he had had no experience in flax mills ; he would have covered the cogs up, if he had had anything to do with them.

From the evidence given on the part of the defendant, it appeared that the plaintiff had been set to work with two other boys at the machine ; that one of the boys, if not the others, was told to stand in front of the machine, and to throw the flax to the plaintiff, who pitched it away with a pitch-fork ; this boy was told how to put the roller in its place when it came out, which was simply by standing in front of the machine and rolling it into its place, reaching over about two and a half feet ; this boy was also told not to go on the side of the machine where the cog-wheels were, in order to put in the roller ; the same boy, whilst working with the plaintiff, put in the roller not in the way plaintiff said he did, but by simply rolling it from the end of the machine into its place, whereas the way the plaintiff did was to reach round from the unprotected side, under the pulley, to get the roller ; he then had to reach up the height of forty-nine inches, and then to reach downward twelve inches, in order to drop the roller into its place, and in doing so brought his coat in contact with the cog-wheels ; there were usually forty boys at work about the place, this morning only about four or five ; the work that the plaintiff was engaged in was light work, and boys usually followed it ; defendant had this machine a year, but it had been used for seven years and no boy had been before injured by it ; the other two boys were sent away by defendant whilst the plaintiff was working, and though only absent a few minutes, when one of them returned the plaintiff was injured.

The evidence given on the part of the defendant also shewed that the boy had been told not to put the roller in in that way; that he had been warned by two of the workmen, who were called, and one of them said he took the roller out of the plaintiff's hand and told him he must not attempt to put it in in that way.

The plaintiff was re-called and said, he did not remember Mr. Craigie, the witness, taking the roller out of his hands or telling him not to put it in in that way. He never tried to put the roller in in that way before the time he was hurt; he had not been alone at the machine more than ten minutes before he was hurt; he did not remember Mr. Shields taking the roller out of his hands and telling him he would get caught.

McDougall, for defendant, at the close of the case, moved for a nonsuit, on the ground that there was no case proved; that the machinery was not dangerous, and because:—1. The defendant was not guilty of negligence.

2. The plaintiff, according to his own evidence, contributed to the injury. He referred to *Cotton v. Wood*, 8 C. B. N. S. 570; *Nicholls v. Great Western R. W. Co.*, 27 U. C. R. 382; *Dowell v. General Steam Navigation Company*, 5 E. & B. 195; *Bolch v. Smith*, 7 H. & N. 736; *Mangan v. Atterton*, L. R. Ex. 239. He urged that if the boy had used any reasonable care he could not have been hurt; that the plaintiff had been warned of the danger, and was a volunteer in going to the side of the machine where he was injured.

The plaintiff's counsel replied that the machinery was in a dangerous state; it could have been protected, yet it was not; and the precaution should be increased where boys were employed; that as to contributory negligence, the case was for the jury on contradictory evidence; that there was evidence of negligence in leaving the boy alone the first day he was at the work, without instructing him how to act; and the evidence was contradictory as to the boy being warned or not; that the boy was doing the act, not as a volunteer, but in the course of his business.

The learned Judge said the evidence was contradictory as to whether the boy was warned or not; that it preponderated in favor of the defendant; that it did not appear that the plaintiff ever saw Patterson, the other boy, put in the roller as he said he did; that the plaintiff was alone at the machine for ten minutes before he was hurt; during that time the flax would not have accumulated so as to require his being away from the table of the machine; that the plaintiff then, having got the roller, attempted to reach up four feet one inch against exposed cog-wheels, and then to drop the roller a depth of twelve inches into its place, when he could have done it from the front or protected side if he did it at all; though he need not have done so, he might have got Mr. Craigie to do it. He then stated that he should direct the jury to find for the defendant; that he was doubtful if the machinery was dangerous; but, if so, the plaintiff contributed to his own injury, and if he had been warned his conduct was almost wilful.

A nonsuit was taken in deference to this ruling.

In Easter term last *C. Robinson*, Q. C., obtained a rule *nisi* to set aside the nonsuit, on the ground there was evidence to go to the jury of the negligence charged, and no sufficient evidence of contributory negligence on the plaintiff's part; and on the ground of misdirection, in this, that the learned Judge directed the jury that there was no evidence of negligence on defendant's part, and that the plaintiff's contributory negligence was a bar to his recovery.

During the same term *K. Mackenzie*, Q. C., shewed cause. Here there is no statutory obligation to fence and cover machinery. There was no evidence at the trial that this machinery was more dangerous than a common fanning mill, yet no one thinks the cog-wheels of that should be covered. *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130, shews the effect of the English Act as to protecting machinery. The plaintiff was a volunteer in the work which caused the accident, and so cannot

recover. *Mangan v. Atterton*, L. R. 1 Ex. 239, 14 L. T. N. S. 411, shews that defendant was not bound to cover the cog-wheels, which the witnesses for the defendant shewed could not be done. In the case cited, defendant left a machine for crushing oil-cake in the market, and the plaintiff, aged four years, at the request of his elder brother put his fingers in the cog-wheel whilst the brother worked the machine; the child's fingers were crushed and had to be amputated. The Court held that it was no negligence in defendant to expose the machine.

The evidence, if any, in this case to sustain the plaintiff's view is a mere *scintilla*, which could not be left to the jury, and would not have sustained the verdict if it had been given for the plaintiff. In *Mellors v. Shaw*, 1 B. & S. 437, 446, Blackburn, J., in giving judgment, said, "There is probably another exception (*i.e.*, where no action will lie), where the master has furnished instruments or machinery which are dangerous, but the servant knows they are dangerous, and the danger is so normal that it is in the ordinary course of the employment: in that case the servant cannot complain of an injury which he has sustained, because he undertook the employment with that risk. *Dynen v. Leach*, 26 L. J. L. S. Ex. 221, may be supported on that ground." In *Hughes v. Macfie*, 2 H. & C. 744, where a child four years old removed a flap that had been carelessly left open, so that it fell on and injured him, Pollock, C. B. said, at p. 749, "Had he been an adult, it is clear he could have maintained no action. He would voluntarily have meddled with that for no lawful purpose which, if let alone, would not have hurt him. He would therefore, at all events, have contributed by his own negligence to his damage. We think the fact of the plaintiff being of tender years makes no difference." In *Cotton v. Wood*, 8 C. B. N. S. 566, the authorities are referred to by Chief Justice Erle to shew that when the evidence is equally consistent with the existence and non-existence of negligence, it is not competent for the Judge to leave the matter to the jury. Here there was no satisfactory evidence of negligence.

Robinson, Q. C., contra. The boy was injured on the first occasion he was sent to work near the machine, which being dangerous and partly uncovered, it was the duty of defendant to have instructed him as to what he was to do, and how to avoid the wheels. The two boys who had knowledge of the mode of attending the machine were sent away, and the plaintiff was left alone without proper instructions to attend this dangerous machine. This was evidence of negligence. The case is hardly distinguishable from *Grizzle v. Frost*, 3 F. & F. 622. The case should have been left to the jury: *Shearman & Redfield* on Negligence, 2nd ed., sec. 28, note 2, p. 32. That a plaintiff is guilty of some negligence does not necessarily deprive him of his right to recover against a defendant, whose negligence was the real cause of the accident: *Greenland v. Chaplin*, 5 Ex. 243; *Whitelaw v. Pollock*, Hay 112; *Dunlop's* cases, 438. He referred to *Shearman & Redfield*, on Negligence, 2nd ed., vol. ii., p. 59, 60, 122; *Gardner v. Grace*, 1 F. & F. 359, as to contributory negligence by children. In *Watling v. Oastler et al.*, L. R. 6 Ex. 73, where a person was employed to clean a machine which was unsafely constructed and in a defective condition, and by reason of not being sufficiently guarded was unfit to be used, as defendants well knew, and no sufficient apparatus was provided to protect the workman who, when cleaning it, was killed, it was held the owners were liable, and if the workman knew of the defective state of the machine that was a matter of defence.

RICHARDS, C. J., delivered the judgment of the Court.

I do not think that defendant was bound to cover that portion of the machinery, the exposure of which is said to be the cause of the accident. The evidence was to the effect that the machine, as it then was, had been several years in use, and that no accident had occurred from the cog-wheels on the one side not being covered.

I will cite language of the Judges, in several cases, shewing that at common law servants had no right to

complain of the want of the fencing of machinery. If they chose to engage themselves to work at a machine, the work itself being of a dangerous character, that was a part of the bargain, and the servant, if injured in doing the work which he engaged to do, and the mode of doing it and the machine by which it was done was such as he and the master both understood would be the case, then he cannot, in case of injury, recover damages from the master, in case he sustained injury in doing this dangerous work.

It is true, in *Gardner v. Grace*, 1 F. & F. 359, Channell, B. stated, "That the doctrine of contributory negligence did not apply to an infant of tender age," but this rule will not, I apprehend, apply to minors who have attained to years of discretion.

"It may be inhuman (for an employer) so to carry on his work as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the machinery and voluntarily uses it." Per Bramwell, J., in *Dynen v. Leach*, 26 L. J. Ex. 223, and cited in *Williams v. Clough*, 3 H. & N. 258.

In *Seymour v. Maddox*, 16 Q. B. 326, which was an action by an actor for damages for an injury by falling through a hole in the stage, Erle, J., said, p. 332, "A person must make his own choice whether he will accept employment on premises on this condition; and, if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light. If he sustain injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted."

"There was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business." Per Willes, J., in *Indermaur v. Dames*, L. R. 1 C. P. 288.

In *Clarke v. Holmes*, 7 H. & N. 943, in the Exchequer Chamber, Cockburn, C. J., approved of the doctrine laid down in the House of Lords in *Bartonshill Coal Company v. Reid*, 3 Macq. H. L. Cas. 266, and added, "No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept."

Bolch v. Smith, 7 H. & N. 736, shews that a defendant is not liable for an injury caused by a partially fenced shaft used for mechanical purposes.

In *Webb v. Rennie, et al.*, 4 F. & F. 614, Cockburn, C. J., said, "If the jury were satisfied that, according to the general practice of ship-builders, poles were allowed to remain two, three, or four years in the ground without being examined, and that the usual mode of raising them was adopted in this case, and that all this had gone on in ship-building yards for years without any accident, then it would be for the jury to say whether, looking to the experience of the past (which, of course, though not conclusive, was always material as an element of judgment), there was any negligence on the part of the defendants; or, whether by leaving the poles so long in the ground without examination there was in this respect a want of due and ordinary care on the part of the defendants."

I cite the above case to shew, that if the machine had been long in use in the state it was when the plaintiff was

injured, it afforded reasonable grounds for supposing that the continuing to use it in the same manner would not be likely to cause accidents, if reasonable care were exercised by those who were working the machine.

In *Grizzle v. Frost, et al.*, 3 F. & F. 625, Cockburn, C. J., said, in charging the jury, "I am of opinion that if the owners of dangerous machinery, by their foreman, employ a young person about it, quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, which they are aware of; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery." This case seems to me to lay down doctrines not unreasonable, which, applied to the facts before us, would go very near if not fully to the extent of sustaining the plaintiff's case.

Here the plaintiff, a young person twelve years old (in that case the plaintiff was under sixteen), was employed about machinery which was to a certain extent dangerous; he was quite inexperienced in its use, and had no proper directions as to using it; in fact, when placed at the machine in the morning, the work he was placed at about the machine involved no risk. Other boys were placed to look after the roller, in the placing of which the plaintiff was injured; these two boys were sent away, and he was left alone to manage at that end of the machine which was still at work.

He says he went to put in the roller, which had been thrown out of place, as he had seen the other boys do it, and in this way the accident occurred. He said he heard Mr. Craigie call, but did not hear what he said; that he had had no caution about the machinery. He also said Shields did not call to him not to put the roller on, nor did Craigie.

No doubt, if the plaintiff had been a man, the facts at the trial show indisputably that he would have been considered as having contributed to his own injury; but,

being young and without experience, and having had no information as to using the machine; having been suddenly called upon to place the roller in its place, and doing it in the same way that he saw the other boys do it,—the case referred to would shew that the evidence, if believed by the jury, would warrant a verdict in his favor.

The evidence on the part of the defendant shews that the other boys did not, in fact, replace the roller in the way the plaintiff says they did, and the other witnesses shew that the plaintiff had been expressly warned not to take hold of the roller from the place where he was standing, as he would probably be injured if he did.

The evidence on behalf of the defendant was ample to free him from all blame, if the jury believed it.

Very likely the evidence on behalf of the defendant may have influenced the learned Judge, and that he was satisfied that according to the real facts of the case the plaintiff ought not to recover.

I think the plaintiff's case a very weak one. He admits that Craigie called out to him when he went to put the roller back, but says that he did not call to him not to put the roller in. When recalled, after defendant's witnesses had been sworn, and stated the roller had been taken out of his hand, and he was told before the accident not to put the roller in in that way, he said, he did not remember Mr. Craigie, the witness, taking the roller out of his hands, or telling him not to put it in in that way. He did not remember Mr. Shields taking the roller out of his hands, or telling him he would get caught. He stated, however, that he never tried to put the roller in in the way that he did it until the time he was hurt.

If the case had been left to the jury, and they had found for the plaintiff on the whole case; if the learned Judge who presided at the trial had been satisfied that the substantial facts were as stated by the defendant's witnesses, I think we would have felt bound to grant a new trial, as the evidence would seem to preponderate so strongly for defendant.

In *Grizzle v. Frost*, 3 F. & F. 622, the evidence was quite as contradictory as in this case, but the jury found for the plaintiff, and I am not aware that the verdict was moved against. Much, of course, would depend on the amount of credit given to the witnesses on either side.

The only grounds on which the plaintiff, in my judgment, can maintain the action is, that being a young person, without skill in the employment, he was set to work at the machine without proper instructions, and that he followed the course, in what he did, that the others had taken in doing the act which had caused the injury complained of.

I think the evidence strongly preponderates against his case if we consider that given for the defendant.

There is perhaps more than a *scintilla* of evidence in his favor, if the jury believed all he said, and disbelieved all that was said by the defendant's witnesses.

My learned brothers, on considering the evidence, think it better to grant a new trial, without costs.

Rule absolute.

GORDON ET AL. V. GREAT WESTERN RAILWAY CO.

Carriers—Railways—Connecting lines—Contract—Through rate.

Plaintiffs bought 24 bales of cotton in Cincinnati, through their agent B., who delivered it there to the C. H. & D. R. W. Co. The bill of lading contained a heading "contract for a through rate." Under the general heading of the C. H. & D. Ry., it stated that the cotton was forwarded by B., and that the shipping marks were: "G. & M.—for Gordon, Mackay & Co., Thorold, Ont., via Detroit & G. W. R.," and in the margin were added the words, "Through at 40c. per 100 lbs., &c., to Detroit via —." The cotton was delivered without instructions to defendants, at Detroit, by the teamster of a line connecting with the C. H. & D. R. W. Co., and was burned while in transit on defendants' line to Thorold.

Held, that the bill of lading shewed a contract with the C. H. & D. R. W. Co. for a through rate to Thorold, and therefore that defendants were not liable to the plaintiffs.

DECLARATION. First count, for not carrying safely 24 bales of cotton, delivered by plaintiffs to defendants to

carry from the City of Detroit, in the United States, to Thorold, on the line of defendants' railway in the Province of Ontario, for certain reward, whereby plaintiffs lost the said goods.

Second count, against defendants as carriers of goods for hire from Detroit to Thorold; alleging that the plaintiffs delivered to defendants, and they received, as such carriers, 24 bales of cotton, to be taken care of and safely and securely carried by the defendants from Detroit to Thorold, and there to be safely and securely delivered to plaintiffs within a reasonable time, for hire; that a reasonable time had elapsed, yet defendants did not take good care of the goods, and safely and securely carry and deliver the same to the plaintiffs, whereby the same were lost to the plaintiffs.

Third count, against defendants as carriers of goods for hire from Detroit to Thorold; the plaintiffs alleging delivered the 24 bales of cotton to be carried, yet defendants so negligently closed their cars or carriages, in which the cotton was stored for transport, that the cotton was set on fire by sparks entering the said carriages or cars from a locomotive engine on defendants' railway, by reason whereof the said cotton was destroyed.

Pleas. 1. To the whole declaration, that the plaintiffs did not deliver to defendants, nor did they receive from the plaintiffs, the said goods in said first, second, and third counts respectively mentioned, upon the terms and conditions and for the purposes respectively mentioned.

2. Not guilty.

3. To the first and second counts, that the goods mentioned in the first and second counts are the same goods; that the plaintiffs delivered the same to, and they were received by the Cincinnati, Hamilton, and Dayton Railroad Company, being common carriers of goods in the United States of America, the termini of their railway being within the United States, to be forwarded by the said railway from Cincinnati to the village of Thorold, in Ontario, upon the terms that the same should be transported by the said railway to the terminus of its road, and there delivered to

the agents of connecting steamboats, railroad companies, or forwarding lines; and on and subject to the terms and conditions, that the plaintiffs thereby released the said Cincinnati, Hamilton, and Dayton Railroad Company, and the steamboat companies, railroad companies, and forwarding lines with which it connected, from liability from damage or delays by unavoidable accidents; and on and subject to the terms and conditions that the said Cincinnati, Hamilton, and Dayton Railroad Company, and the steamboat companies, railroad companies, and forwarding lines with which it connected, and which should receive the said goods, should not be liable for loss or damage thereto by wet, dirt, or fire; nor for loss or damage of any kind, on any article the bulk of which should require it to be carried on open cars; nor for loss or damage to the said goods by fire or other casualty while in transit, or while in depots, or places of transshipment, or at a depot or landing at a point of delivery. And the said goods in the course of being forwarded to Thorold, as and in manner aforesaid, were, pursuant to the terms aforesaid, delivered to the agent of the defendants at Detroit, the defendants being a connecting railroad company, and their railway being a connecting forwarding line, within the meaning of the terms and conditions aforesaid, and were so received by the defendants to be forwarded to Thorold as aforesaid, upon and subject to the terms and conditions aforesaid, and not otherwise howsoever;* that the said goods, while being forwarded by the defendants in the usual course of their business, caught fire and were damaged and destroyed, and that the fire was accidental; and by reason of the said damage and destruction the defendants were prevented from delivering the said goods in the first and second counts mentioned.

Fourth plea, to first and second counts. That the goods in the first and second counts are the same goods; that they were delivered by the plaintiffs to and received by defendants, on the terms that the plaintiffs released the defendants from liability from damage or delay by unavoidable accident, and on and subject to the terms and conditions that

the defendants should not be liable for loss or damage thereto from wet, dirt, or fire, nor for loss or damage of any kind, on any article the bulk of which should require to be carried on open cars, nor for loss or damage to the said goods by fire or other casualty whilst in transit, or while in depots or places of transshipment, or at a depot or landing at a point of delivery. And that the defendants at the request of the plaintiffs received the said goods to be carried from Detroit to Thorold on and subject to the said terms and conditions and not otherwise: that the said goods, while being so conveyed from Detroit to Thorold in the usual course of the defendants' business, caught fire and were damaged and destroyed, and that the fire was accidental; and by reason of the said damage and destruction the defendants were prevented from delivering the said goods in the first and second counts mentioned.

The fifth plea to the third count was the same as the third plea to the first and second counts do .n to the asterisk, and proceeded; and defendants say that the loss sustained by the plaintiffs in respect to said goods, as in the third count mentioned, was so sustained whilst the goods were being forwarded by the defendants in the usual course of their business to Thorold, upon the terms and conditions aforesaid, and not otherwise; that the loss, damage, and injury so sustained by the plaintiffs in respect of the said goods was a loss, damage, and injury within the meaning and true intent of the said terms and conditions, and as to which the plaintiffs released defendants from liability, and agreed that defendants should not be liable.

Sixth plea to the third count, the same as the fourth plea to the second count to the asterisk, and proceeding; that the loss sustained by the plaintiffs in respect of said goods in the third count mentioned was so sustained while the goods were being forwarded by the defendants in the usual course of their business to Thorold, upon the terms and conditions aforesaid and not otherwise; that the loss and damage so sustained by the plaintiffs in respect of the said goods was a loss, damage and injury within the meaning and true intent

of the said terms and conditions, and as to which the plaintiffs released the defendants from liability, and agreed that the defendants should not be liable.

Seventh plea to the third count; that defendants did use due and proper care in conveying the said goods.

Issue was joined on all the pleas.



The cause was tried at the Spring Assizes at Toronto, before Galt, J., and the plaintiffs were nonsuited.

On the trial, it appeared in evidence that the cotton in question was bought in Cincinnati, twenty-four bales, on the 13th June, 1872. It was bought through Erastus Burnham, a cotton broker, for the plaintiffs, and the margin of the invoice was "shipping mark G. & M., via Detroit and Great Western R. W. Co.

On the same day a bill of lading appeared to have been signed for the twenty-four bales.

This bill of lading contained a good many conditions, and was as follows :

CINCINNATI, HAMILTON, AND DAYTON RAILROAD COMPANY
Lessees of the
DAYTON & MICHIGAN AND RICHMOND & CHICAGO RAILROADS.
EXPRESS FREIGHT LINE.

 Contract for a through rate 

J. R. Reed, General Freight Agent.

W. H. Eagle, Contracting Agent, 115 Vine St.

Cincinnati, June 13, 1872.

Forwarded by *E. Burnham* the following packages, contents unknown, in apparent good order, viz. :

Marks.	Articles.	Weight subject to correction.
G. & M. For Gordon Mc via Detroit & G. W. R. R.	24 Bales Cotton. Kay & Co., Thorold, Ontario. 24 Bl. Cotton.	11,185

Original

Through @ 40 c.
per 100 lbs.

@ p. Barrel.

To Detroit

via _____

Marked and numbered as per margin,
to be transported by the Cincinnati,
Hamilton, and Dayton Railroad Company
to terminus of its roads, and there deliver
to the agent of connecting steamboats,
railroad companies or forwarding lines, on
the following terms and conditions, viz. :
that the shipper, owner and consignee do
hereby release the Cincinnati, Hamilton,
and Dayton Railroad, and the boats and

railroads with which it connects, from loss or damage arising from the acts of Providence, also damage or delays by unavoidable accidents : that the said Cincinnati, Hamilton, and Dayton Railroad Company, and steamboats, railroad companies, and forwarding lines with which it connects, and which receive said property, shall not be liable for leakage of oils, * * or breakage of any kind of glass, earthenware, * * * or for rust of iron or iron articles, or for loss of or damage by wet, dirt, or fire, or loss of weight or condition bailing on hay, hemp, or cotton, nor for loss or damage of any kind, on any article whose bulk requires it to be carried on open cars, * * * nor for loss or damage of any article of property whatever, by fire or other casualty, while in transit or while in depots or places of transshipment, or at depot or landing at point of delivery, nor for loss or damage by fire, collision or the dangers of the navigation while on seas, rivers, lakes, or canals. * * *

It is further agreed that the Cincinnati, Hamilton, and Dayton Railroad Company, and the steamboats, railroads, and forwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order, by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. * * *

It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or

may be incurred, that Company alone shall be held answerable therefor, in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

And it is further agreed that the amount of the loss or damage so occurring, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property, at the place and time of shipment under this bill of lading. * * *

This contract is executed and accomplished, and the liability of the companies as common carriers thereunder terminates on the arrival of the goods or property at the landing station or depot of delivery; and the companies will be liable as warehousemen only thereafter; and unless removed by the consignees from the station or depot of delivery within twenty-four hours after their said arrival, they may be removed and stored by the Company at the owners' expense and risk. * * *

In witness whereof the agent hath affirmed to two bills of lading of this tenor and date, one of which being accomplished, the other stand void.

(Signed)

W. H. EAGLE, Agent."

On the 17th of June these goods were carried by the transfer teamster of the Lake Shore and Michigan Southern R. W. Company at Detroit, to and delivered there to defendants' agent in that city. The party who delivered them did not know where the goods originally came from. The receipt given by the one company to the other was produced. The person delivering the goods said he made no contract for carriage of the cotton, he merely took it from one station to the other of the two companies.

The receipt was as follows :

" DETROIT, June 7th, 1872.

Received in good order from the Lake Shore and Michigan Southern Railway Co., the following described property :

Consignee & Destination.	Articles.	Weight.	Amount.
Gordon McKay & Co. Thorold.	24 Bales Cotton.	11,185	44.74

(Signed) THOMAS CRAFT, Agent.

One of the plaintiffs was examined as a witness on the trial. He said they had bought cotton for the last ten years and shipped it through Detroit; that the cotton in question was never received by the plaintiffs. It was burned at Harrisburgh, on the defendants line. It was in bond at the time.

The defendants' counsel moved for a nonsuit, on the following grounds: 1. That no contract is shewn between the plaintiffs and defendants. 2. That the defendants are protected under the original bill of lading.

The learned Judge was of that opinion, and directed a nonsuit, reserving leave to the plaintiffs to move to enter a verdict in their favour for \$2,564.80, or such other sum as the Court might think they were entitled to.

In Easter term *D. B. Read*, Q. C., obtained a rule *nisi* to set aside the nonsuit and to enter a verdict for the plaintiffs for \$2,564.80, or such sum as the Court might direct, pursuant to leave reserved.

During this term *M. C. Cameron*, Q. C., shewed cause, The exceptions relieving the carriers from loss by fire extend to all the railways who receive the goods for transport. They are in truth connecting lines, though that connection may be formed through other lines. There is no contract by the defendants with the plaintiffs. The plaintiffs contract with the Cincinnati Company to transport the cotton through to its place of destination, and they hand it over to defendants for that purpose, paying them a portion of the whole freight. *Collins v. The Bristol and Exeter R. W. Co.*, 7 H. L. Cas. 194, finally disposed of in the House of Lords, shews that when the contract is with one Company to carry goods through to the place of des-

tinuation, another Company over whose line the goods pass, though receiving a portion of the freight, is not responsible for injury to such goods.

Mytton v. The Midland Railway, 4 C. B. N. S. 615, 620, was an action by a passenger for the loss of his portmanteau. He took a ticket at the Newport station of the South Wales R. W. Co. to Birmingham, for which he paid the entire fare. The S. W. Co. extends from Newport to within 12 miles of Gloucester, and that 12 miles was travelled over the G. W. Railway. The defendants' Company had a line from Gloucester to Birmingham. By arrangements between the three Companies tickets were issued for the entire distance, and the fares were divided between them according to the mileage travelled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales Railway carriage and delivered it to a guard of the Midland Railway. On arriving at Birmingham the portmanteau was missing. In the action against the Midland Railway it was held that the contract was an entire contract with the South Wales Railway Co. to convey the whole distance, and consequently the Midland Company were not liable. Here the contract was with the Cincinnati Company to convey the whole way, and defendants are not liable. *Crawford v. Great Western R. W. Co.*, 18 C. P. 510, refers to many of the cases and sustains the view of the defendants.

D. B. Read, Q.C., contra. Though the English cases may have decided in effect that the payment of one entire freight for the whole transit shews but one contract, with the company by whom the goods were shipped from the point of departure, yet this is not a contract to carry to Thorold but to Detroit, and the defendants' Company cannot be a connecting company with the Cincinnati Company, and therefore the exceptions in favour of such companies cannot relieve defendants from the common law liability to carry safely.

The exceptions may well apply to the connecting lines and not to defendants' line. When there is one contract to deliver, and the goods are conveyed partly by water and

partly by Railway, the statute regulating traffic by carriers by land may apply to that portion of the transit which is by land, and the general law to that which is by water, shewing that one rule may apply to one portion of the transit, and another to another portion: *Baxendale v. Great Eastern Railway*, L. R. 4, Q. B. 244; *Le Conteur v. London & South Western Railway*, L. R. 1, Q. B. 54; *Coxon v. G. W. R.*, 5 H. & N. 274; *Fowles v. G. W. Ry. Co.* 7 Ex. 299. He referred also to *Redfield* on Carriers and Bailees sec. 180, and notes p. 147; *Nutting v. Connecticut River Railroad Co.*, 1 Gray 502.

RICHARDS, C. J., delivered the judgment of the Court. The case seems to turn on the question whether this is a contract to carry from Cincinnati to Thorold. The bill of lading, as it is called, on the face of it, appears to be on a contract for a through rate. It states that the goods were forwarded by E. Burnham, and with the marks "G. & M." for "Gordon, McKay & Co., Thorold, Ontario, 24 Bl. cotton, via Detroit & G. W. R. R."

This would *prima facie* seem to be that the goods were to be carried to Thorold and that they were to be carried to that place by way of Detroit and the defendant's railway.

The plaintiff was sworn on the trial, and if the nature of the contract was not to carry to the consignees at Thorold, and the rates to be at 40 cents a hundred pounds for the through freight, he could have said so.

There is nothing to shew that the *transitus* was to terminate at Detroit. If so, there was no necessity of saying "G. W. R. R." in addition to Detroit.

In the margin opposite the lower part of the bill of lading is, "Through @ 40 c. per 100 lbs., under that to Detroit via " with blank lines under it.

If this means that the through rate was 40 cents to Detroit, and that the parties to the bill of lading only bargained for a through freight to Detroit, and at the rate of 40 c. per 100 lbs. to that city, and that the consignees were to pay additional freight from that place to Thorold, a dif-

ferent view might be taken as to the liability of the defendants, if the *transitus* which the Cincinnati Company undertook was only to Detroit, and then as the agent of the plaintiffs they delivered the goods to the defendants, to be carried to Thorold on a substantially new contract.

The latest case to which we were referred on the argument was that of *Coxon v. The Great Western Railway*, 5 H. & N. 272. There the plaintiff sent some oxen from the Craven Arms station of the Shrewsbury and Hereford Railway to be carried to Birmingham. The railway from that station to Shrewsbury belongs to the Shrewsbury and Hereford Railway; from Shrewsbury to Birmingham, it belongs to the Great Western Railway. The condition on the way-bill granted by the Shrewsbury and Hereford Company was as follows: For the convenience of the owner the Company will receive the charges payable to other Companies for conveyance of such cattle over their lines of railway, but the Company will not be subject to liability for any loss, delay, default, or damage arising on such other railway. One sum was charged for the carriage, *which was to be paid at Birmingham*. The oxen were placed in trucks belonging to the G. W. Railway, and on their arrival at Wolverhampton it was found that the bottom of one of the trucks was broken, one of the oxen dead, and others injured. In an action against the Great Western Company it was held that it was one contract with the Shrewsbury and Hereford Railway Company for the entire distance, from the Craven Arms station, Birmingham, and that the Great Western Railway were not liable for the injury to the oxen.

The view of the Court there was that the contract was an entire contract; that the only way in which a plaintiff could succeed in cases of that kind was by establishing that the Companies were partners in the transaction, as was suggested in *Mytton v. The Midland Railway Company*, 4 H. & N. 615, in which case he would have right to sue any one of them.

The inference I draw from the bill of lading is, that the Cincinnati Company are the parties who contract with

plaintiff for a through rate to Thorold *via* Detroit and the G. W. Railway, and they undertake to deliver to the connecting lines, and then the terms of carriage by these lines in reference to accidents are introduced.

It may be that the 40c. per 100 lbs. is not for a through rate to its place of destination, and that the Cincinnati Company only connect with lines which carry to Detroit, and that they then deliver it as the agent of the plaintiffs to the defendants to carry, not as a connecting line between Cincinnati, but as an independent line, and that the goods are so delivered to defendants as any other merchandize which they undertake to carry, and having made no special exceptions as to risk the defendants incur the common law liability of carriers.

If the evidence is capable of two views, one favourable and the other unfavourable to the plaintiff, I suppose on the present motion we ought not to enter a verdict for the plaintiffs but let the nonsuit stand.

If it is seriously contended that this is not a contract for the carriage through from Cincinnati to Thorold, at one freight, then it would be desirable that there should be a new trial, that that fact may be shewn.

If it were so, I take it for granted that when the plaintiff Gordon was in the witness-box he would have said so.

Rule discharged.

O'NEIL ET AL. V. McILMOYLE.

Contract to get out railway ties—Appropriation and delivery—Right of property.

By agreement under seal, dated 29th December, 1871, defendant agreed to deliver to plaintiffs, within four and a-half months from date, 5,000 railway ties on the Midland Railway track, at Lakefield, or between there and Peterborough, said ties to be stacked conveniently for loading and inspection; a particular description of ties was specified as the only kind that would be received; the price of each was to be 18 cents; 25 per cent. to be paid when 1,000 or over were delivered and estimated at Young's Point, on the Otonabee River; 25 per cent. more when the ties were delivered on the railway, and the balance within four weeks of the full completion of the contract, but not before the expiration of the time limited in the contract.

The evidence shewed that defendant got out 5,280 ties in all; that the plaintiffs paid \$240 to defendants, and \$123.96 Crown dues; and that they received and took away 2,519 ties. A misunderstanding arose as to where the remainder of the ties, which had been brought to Lakefield, were to be culled and inspected, the plaintiffs wishing it at Port Hope, and defendant at Lakefield, and defendant refused to allow the ties to be shipped from Lakefield till paid for. The plaintiff said he accepted them at Lakefield, subject to the culling, in which defendant was to take a part, and one W. swore that he counted and selected them at Young's Point, and reported on them to the plaintiff before they advanced any money, but defendant appeared not to have been aware of this. Plaintiffs having replevied a quantity of the ties:

Held, that he could not recover: that the contract itself did not vest ties in the plaintiff, for they were not then in existence: that it contemplated an inspection, which had not taken place; and there was no other appropriation or delivery of these ties with an intention that the plaintiffs should take them.

REPLEVIN for 3,228 railway ties.

Pleas. 1. *Non detinet*. 2. Goods not the plaintiffs'.

The case was tried before Richards, C. J., at the Spring Assizes at Peterborough.

On the trial, an agreement, dated 29th December, 1871, under seal, was put in, by which the defendant agreed to deliver to the plaintiffs, within four and one-half months from its date, 5,000 railway ties on the Midland Railway track, near Lakefield, or on the track between there and Peterborough, to be stacked on level ground, &c., convenient for loading on railway cars, and in a convenient manner for inspection; and the contract stated that the only description of ties which would be received was the best quality of white

oak, &c., setting out the description. The price of each tie got out and received, according to the specifications, was to be 18 cents, and payments were to be made as follows:—twenty-five per cent. of the contract value of the ties when any quantity of 1,000 or over were delivered and estimated on at Young's Point, Otonabee River, such estimates to be made every four weeks, as far as convenient; and twenty-five per cent. more when the ties were delivered on the railway at Lakefield, in monthly estimates; and the whole of the balance within four weeks of the full completion of the contract, but not before the time of the expiration of the contract.

R. O'Neil, one of the plaintiffs, was examined, who stated that he received a letter from the defendant, dated, Lakefield, 10th July, 1871, addressed to the plaintiffs, as follows:

"I received your letter on Saturday, and \$40, for which accept my thanks. As regards the culling at Port Hope, I would as soon have them culled there as here, but I have got ties belonging to two parties, which I want culled separate. You will please come out to-morrow and see them; I am all done now, and then we will make a bargain about loading.

"GEO. MCILMOYLE."

That one of the plaintiffs went to Lakefield as soon as he could; that he got there in the early part of August, saw the defendant and accepted the ties there, subject to culling; they were alongside the railway track at Lakefield, and he had at that time paid defendant a little over \$240: that after the plaintiffs replevied them they were prevented taking them until the Crown dues were paid, \$123.96, and including that amount the defendant received more than the value of the ties taken: that there was no dispute as to the culling at Lakefield or at Port Hope; it was understood the ties were to be culled, plaintiffs selecting the culler, defendant to have something to say about the culling.

Another witness, *W—*, stated that he was the agent of the plaintiffs; that while the defendant was getting out the ties he went up to see about them at Young's Point:

that when the defendant would write he, the agent, would go to Young's Point to examine the number of ties got out ; that he marked one or two in a pile, and reported to the plaintiffs when they advanced the money. All the ties got out were delivered at Lakefield. He stated he was employed to inspect them, and it was understood when he went to Young's Point he was to do so, and he did do so : that the number of good ties were 3,228 : that the defendant would not allow them to be removed without they were inspected and paid for before they were loaded on the cars ; 2,519 were accepted by the agent and put on the cars, and he said he told defendant the plaintiffs would pay the balance due on the ties, if he would allow to be inspected as they were put on the cars, and before they would leave the station : that the defendant declined to do so, and insisted on being paid the whole.

On cross-examination, he said he was not at Young's Point on other business ; that he marked the ties with a piece of white chalk ; that he measured some of them, and marked all he selected with the chalk.

A witness living at the Lakefield Station testified, that he was asked by plaintiffs to ship the ties ; that a car was sent for, and that defendant would not allow them to go until he was settled with.

The Crown timber agent stated, that the Government dues on the ties were \$123.46—8 cents each, and that he would not allow them to be removed until the plaintiffs paid and became responsible for the amount ; that the plaintiffs did so, and he allowed them to be removed ; this was after the replevy.

At the close of the plaintiffs' case it was objected that the plaintiffs could not recover ; that defendant was entitled to hold the property unless paid for, and he was not paid when the action commenced ; that the property did not vest in the plaintiffs under the agreement.

The learned Chief Justice reserved leave to defendant to move to enter a verdict for him.

For the defence the defendant was called. He stated, that an arrangement was made at the time of the agreement

as to culling ; that a person was to be employed to cull : that in July or August, when the plaintiff was in Lakefield, he wanted the witness to ship the ties to Port Hope, the culler was so busy he could not come out, and that he, plaintiff, said he could not then stop to count or cull them : that he, witness, wrote several times pressing for money : that he remembered the witness *W*—— : that he did not understand he was selecting or counting the ties : that Wilson said he was there about some cheese business : that he said, understanding there was some difficulty between plaintiffs and witness, he wished to arrange it ; that no marks were put on the ties ; a culler was not named between the parties.

A letter from defendant was produced, dated Lakefield, 29th April, 1872, addressed to the plaintiffs, stating, that he had 1,500 ties at Lakefield, and that he was piling them, and requesting plaintiffs to send an inspector out by Wednesday, and that if they wanted him to load them on the cars he would do so for a cent per tie, and saying that the plaintiffs would oblige him if they would have them taken away as he brought them, as the ground he had to pile them on was small. The letter also requested to send twenty-five per cent. The defendant stated that 5,280 ties in all were got out.

A verdict was entered for the plaintiffs and 10s. damages.

During Easter Term last, *Harrison*, Q. C., obtained a rule to set aside the verdict and to enter a verdict for the defendant, or a nonsuit, pursuant to leave, on the ground that, under the agreement and evidence, the property in the ties had not passed to the plaintiffs ; that under any circumstances the defendant was entitled to hold the ties till paid for ; and on the ground that the verdict was against law and evidence and the weight of evidence.

During the term, *S. Richards*, Q. C., shewed cause. Under the contract, the defendant undertook to get out and deliver 5,000 ties. There was no proviso for culling them, and nothing in the contract to shew who was to inspect them.

The contract resembles one for the construction of a ship, to be paid for by instalments as the ship is built: *Wood v. Bell*, 5 E. & B. 571; 6 E. & B. 635; *Roberts v. Strickland*, 28 U. C. R. 225. The plaintiffs only replevied 3,228 ties, and the amount they had paid defendant would be more than fifty per cent. on that number of ties; but, besides that, they paid the Crown dues, which, beyond doubt, made more than fifty per cent., and they were entitled to the ties upon paying that proportion. He referred to *Burton v. Bellhouse*, 20 U. C. R. 60; *Bank of Upper Canada v. Killaly*, 21 U. C. R. 9; *Turley v. Bates*, 2 H. & C. 200; *Martineau v. Kitching*, L. R., 7 Q. B. 436; *Swanwick v. Sothorn*, 9 A. & E. 895.

Harrison, Q. C., contra. The ties were not to pass by the contract until inspected and found to answer the description in the contract, and the dealings of the parties shews that intention. The proviso that the ties were to be "stacked in a convenient place for inspection" shews there was to be an inspection. As to the evidence, the defendant says he got out 5,200 ties, which at eighteen cents each, if all passed the culler, would be \$960. The payments on account were not made on any particular ties, for none were inspected or culled. They never were inspected, because a dispute arose as to where they were to be culled. The plaintiff wanted them culled at Port Hope, the defendant at Lakefield. The rule as to property passing is laid down in *Logan v. LeMesurier*, 6 Moore P. C. 132, by Lord Brougham. He also referred to *Paton v. Currie*, 19 U. C. R. 388; *Robertson v. Strickland*, 28 U. C. R. 221; *Lockhart v. Pannell*, 22 C. P. 597.

MORRISON, J., delivered the judgment of the Court.

The main point for our determination in this case is, whether the ties in question were delivered to or vested in these plaintiffs, so as to entitle them to maintain this action. And that question depends upon the contract entered into between the parties, their intention as shown by its terms, as well as their acts done in relation to it.

Now, the general rule, as laid down in *Blackburn* on Sales, 152, is, "that where anything remains to be done to the goods for the purpose of ascertaining their price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods; the performance of those things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted."

This rule is somewhat restricted by the judgment in *Turley v. Bates*, 2 H. & C. 200, but not so as to affect its application to this case.

And in *Logan v. Le Mesurier*, 6 Moore P. C. 116, Lord Brougham, giving judgment, says, at p. 132: "Now to constitute a sale which shall immediately pass the property, it is necessary that the things sold should be certain, should be ascertained in the first instance, and that there should be a price, either ascertained or ascertainable. * * The question must always be, what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until the thing is done." And further on, p. 133: "But taking the whole of these terms together, it appears to us, that until the measurement and delivery was made, the sale was not complete, there being nothing in the terms to show an intention that the property should pass before the measurement."

The case of *Simmons v. Swift*, 5 B. & C. 857, comes the nearest to this case. The agreement there was for the sale of a quantity of bark stacked at a place named, and for a certain price per ton, which Swift agreed to take and pay for at a future day. It was afterwards verbally agreed between the parties that a brother of Simmons should see the bark weighed on his part, and one Digget on the part of Swift. Eight tons were weighed in the presence of the brother and Digget and taken away, the brother being asked by Swift

to see it weighed ; but he was not directed to do so by Simmons, and was not aware of the sale until sent for by the defendant. A flood damaged the residue of the bark, and Swift refused to pay for it, and the question was whether the bark was vested in Swift.

Bayley, J., in giving judgment, said, at pp. 862, 863, " I think that the property did not vest in the defendant. * * The defendant agreed to buy the bark stocked at Redbrook, meaning, of course, all the bark stocked there ; but it was to be paid for at a certain price per ton. The bargain does not specify the mode in which the weight was to be ascertained, but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist on keeping possession where the bark had been weighed. If he was anxious to get rid of the liability of accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done it remained at his risk."

And, after referring to *Hanson v. Meyer*, 6 East 614, he proceeded, " So here the contract made weighing necessary, for without that the price could not be ascertained."

And Littledale, J., who entertained doubt, said at p. 865, " Although the property might vest in the purchaser, it would not follow that he could enforce a delivery until the weight of the bark had been ascertained and the price paid. Here there was not a delivery in fact, nor was the delivery of part a constructive delivery of the whole."

In this case, the ties contracted for had to be made ; they were not in existence at the time of the contract ; they were to be made according to certain specifications, and to be stacked by the plaintiff in a convenient manner, at a particular place, Lakefield, for inspection ; and it was stipulated that the only ties which would be received were those that would be according to the specifications ; and to carry out that stipulation, and before the ties could be delivered, it was necessary that the ties stacked should be selected or culled, and, as the evidence shews, such was the intention of both par-

ties ; the culler to be named by the plaintiff, but the defendant had to be an actor in the culling ; and so before the number and the price of the ties could be ascertained, each tie had to be so inspected to see that it met the specification.

Now, from this contract, what could have been the intention of the parties other than this, that before the ties became the property of the plaintiffs, or that they could be delivered by the defendant to them, or before they could be held to be liable for them, a selection and appropriation of the specific ties that answered the description had to be made after their arrival at Lakefield, that is, they had to be culled and selected ; and the plaintiff and defendant were both entitled, before the one became liable to pay for the ties and the other parted with his property in them, that they should be so selected and appropriated.

The evidence shews that such was the intention of the parties, and their construction of the contract.

In *Atkinson v. Bell*, 8 B. & C. 277, Bayley, J., said, at p. 282, 283 : " Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And, although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. * * They were Sleddon's (the maker's) goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then the case would have been within *Rohde v. Thwaite*, 6 B. & C. 388, and there would have been a complete appropriation vesting the property in the defendants."

Hollroyd, J., said, at p. 284, " There was no specific appropriation of the machines assented to by the purchaser, and the property of the goods therefore remained in the maker."

In *Wait v. Baker*, 2 Ex. 1, Parke, B., says, at p. 7, " It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would

be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed; and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shewn in this form of action—the action being for the recovery of the property—that at some subsequent time the property passed.”

And after referring to the circumstances, he added, p. 8 : “It is admitted by the learned counsel for the defendant that the property does not pass, unless there is a subsequent appropriation of the goods. The word *appropriation* may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article in performance of his contract; and the contract will shew when the word is used in that sense. Or the word may mean that *both* parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case.”

And after referring to the Roman Law, he says, p. 9 :— “The law of England is different: here property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it. ‘*Appropriation*’ may also be used in another sense, and is the one in which Mr. *Butt* uses it on the present occasion; viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it.”

Here the defendant, in pursuance of his contract, gets out a certain number of ties and has them brought to Lakefield for inspection, and he writes to the plaintiffs on the 10th July, 1871, to come the following day and see them. The plaintiff does not go for nearly a month, when he makes a hurried visit, and, according to the plaintiff's evidence, he saw the defendant, and said he would accept the ties, subject to their being culled, the culling to be done by the plaintiff's culler, the defendant taking a part in doing so. They were

never selected or culled. The plaintiff desired to ship them at Lakefield and have them culled at Port Hope. Defendant refused to deliver or allow them to be shipped to Port Hope until paid for them, the time for such payment being past due.

It is quite evident from the letter put in that the defendant was apprehensive, if he parted with the ties to the plaintiffs, he would never be paid for them.

Can it be said under these circumstances that there was any *appropriation* or delivery of the ties to the plaintiffs?

The clear intention of the defendant was not to vest the property in the plaintiffs, or part with the possession, unless they were inspected at Lakefield and paid for.

The mere statement of the plaintiff, that he accepted the ties, subject to their being culled, without a corresponding assent on the part of the defendant, did not vest the ties in the plaintiff without the consent of the defendant.

The learned Chief Justice, who tried the cause without a jury, although he entered a verdict for the plaintiffs, reports that he did so formally :—that as to the evidence of the witness W——, it did not appear to the learned Chief Justice that the defendant was aware of the object of that witness's visit to Young's Point, or that he was aware of that witness counting or selecting any ties there; and if he did do so, the defendant was not an assenting party to his doing so.

Be that as it may, the defendant's contract was to stack them at Lakefield for inspection; and it seems to me that the visit of the witness Wilson to Young's Point was one for the purpose of reporting to the plaintiffs whether the defendant was getting out ties, so that the plaintiffs might be safe in advancing money under their contract with defendant.

On the whole, we are of opinion that the defendant is entitled to our judgment: that the rule to enter a verdict for the defendant should be made absolute: that the contract itself did not vest in the plaintiffs any property in the ties in question, as they were not in existence at the time of the executing the contract: that before the property in any of

the ties could vest in the plaintiffs they had to be inspected or culled under the supervision of the plaintiffs' culler and defendant, as the contract stipulated for only one description of ties that would be received, and the number of those ties ascertained; that there is no evidence that such inspection took place; and that it was not proved that there was any other appropriation or delivery of the ties by the defendant with an intention that the plaintiffs should have or take possession of them.

Rule absolute for defendant.

IN RE AN ATTORNEY.

Attorney acting without authority—Striking off roll—Costs.

L. & A., partners, dissolved partnership, it being understood that L. should pay the debts, &c. There had been ill-feeling and litigation between them in which the attorney, had acted for L. The attorney being authorized to act for R. W. & Co., creditors of L. & A. for a sum under \$500, applied to L. for information as to other creditors of the firm, whose names he might use in order to put L. & A. in insolvency. L. told him to use the names of K. & D. of Rochester, U. S., stating that they would agree to what he, L., said. On the 3rd of May, 1873, the attorney served a demand on A. in the names of R. W. & Co. and K. & D., requiring them to make an assignment in insolvency, and on the same day he wrote to K. & D. asking for their sanction. They made no answer; and A. having gone to Rochester and settled their claim, applied to set aside the demand. The attorney, thereupon abandoned the proceedings and paid A.'s costs. On a motion to strike the attorney off the rolls for this, on affidavits attributing his conduct to malice.

Held, under the circumstances, which are more fully set out in the report, and malice being expressly denied, that the rule should be discharged; but as the attorney had been indiscreet, he was directed to pay the costs of the application.

IN EASTER TERM, *Arnoldi* obtained a rule *nisi* on behalf of one G. W. A., calling on an attorney to shew cause why he should not be struck off the roll, and why he should not pay the costs of this application, upon the grounds: 1. That he, without any authority, used and signed the name of Messrs. K. & D. of Rochester, N. Y., creditors of said G. W. A. and one L., to a demand upon, and without any authority from K. & D. made a demand upon the said

G. W. A. in connection with his late partner L., formerly trading under the name of "L. & A.," to make an assignment of his estate, &c., for the benefit of the creditors of the said partnership, and caused the same to be served on the said G. W. A. 2. That the said attorney, in making and signing the said demand, falsely represented and held himself out to be the attorney for Messrs. K. & D., whereas he had no instructions from them or any one on their behalf for making the demand, or otherwise in the premises. 3. That the said attorney conspired with the said L. in the premises to force the said G. W. A. to go or put his estate into insolvency, and acted maliciously and abused the powers given by the Insolvent Act of 1869, in making the demand. 4. That the said attorney acted maliciously and for the purpose of injuring the character, reputation, and credit of the said G. W. A.; knowing that the said L. had agreed to pay all the liabilities of the firm of L. & A., and his conduct was and is a violation of his duty, and not befitting him as an attorney, &c.

It appeared from the affidavits and papers filed, that on the 3rd May, 1873, the attorney served a notice on L. & A. addressed to them as follows :

"INSOLVENT ACT OF 1869.

"You are hereby required, to wit, by Messrs. R.W. & Co. of Albany, N. Y., creditors for the sum of \$315, and Messrs. K. & D. of the city of Rochester, N. Y., creditors for the sum of \$256.32, to make an assignment under the above Act, for the benefit of your creditors. Yours, &c.

"May 3rd., 1873."

To this the names of the two firms were appended, per the attorney, and it was served on the day of its date.

It appeared clearly from the affidavits filed, that though the attorney had authority to act for the firm of R. W. & Co., he had no authority, actual or implied, to act for Messrs. K. & D.

On the same day, the attorney wrote to K. & D. a letter, which they received on the 5th of May, at Rochester, in the following terms :—

"Messrs. K. & D., Rochester.

"Gentlemen—You are, I am informed, creditors of Messrs. L. & A. to the extent of \$256.32. I am acting for R. W. & Co. of Albany, also creditors to about \$300. Last November L. & A. dissolved, the latter going out of the business. Last week several of the firm's creditors served on L. a demand that *he* should make an assignment under the Insolvent Act, which he, on Tuesday last, did. Now, he only assigned his own individual estate. Mr. A., last fall, transferred some valuable real estate to his lawyer, and I wish to have Mr. A.'s estate, as well as Mr. L.'s, brought into the pool for the benefit of the creditors of L. & A. Mr. A., since his dissolution, does not reside in , but happens to be here to-day. Our Statute requires creditors to the extent of \$500 to make a demand to assign; and I, at Mr. L.'s suggestion, used your names in conjunction with that of R. W. & Co. of Albany, in demanding of *them* to make an assignment under the Act. The Statute allows them four days after service, when, if they have not assigned, a writ of attachment under the compulsory liquidation clauses can be issued. I write to to know if you sanction the use of your name as stated, and request the favor of a reply by return of mail.

"I am, very respectfully."

(Signed by the Attorney.)

To this letter, and a telegram requesting an answer to it, K. & D. made no reply.

G. W. A. took immediate steps to have the demand set aside, and on the 7th May, a petition for that purpose and to stay all further proceedings in insolvency, was brought before the County Judge, when the hearing of the petition was adjourned at the request of the attorney, until the 19th of May.

On the 19th of May, the attorney appeared and submitted to the prayer of the petition, and to pay the costs of the proceedings.

The affidavit of G. W. A., also shewed that on the 5th of May, he had telegraphed to K. & D., "Have you instructed the attorney to demand me to assign in insolvency? What is amount of your claim in gold? Answer." And on the same day D., one of the firm of K. & D., an-

swered, "Our claim \$298 in currency. I do not know the attorney." He also stated his belief that the demand to assign was made with the knowledge of L., and by the advice of the attorney, solely for the purpose of annoying, harrassing, and if possible ruining him and his credit and reputation.

His affidavit shewed also that on the 29th of November, 1872, L. had laid a complaint against G. W. A. before a magistrate, of having unlawfully, and with intent to defraud, taken and converted to his own use \$48, the property of L: that the complaint was prosecuted by L. with the attorney acting as his counsel, to the utmost, and every effort was made by them to have him convicted, but he was acquitted. He stated that he believed the charge was made solely for the purpose of annoying him and destroying his credit and reputation.

Affidavits were filed in reply during this term. That of Mr. L. stated that after his assignment the attorney had made enquiries of him in reference to his assignment, and about the creditors of L. & A. as distinguished from L.'s personal creditors. About the 3rd of May the attorney met him on the street near his office door, and asked if there were any of the creditors of L. & A. that he, L., knew well enough to instruct him, the attorney, to use their names in conjunction with R. W. & Co., in making a demand on L. & A. to assign under the Insolvent Act: L. went to the attorney's office, looked over the printed list of his creditors, and told the attorney he might use the names of K. & D. that he found in the list; and he assured the attorney he was individually and intimately acquainted with both K. & D., that they knew the circumstances of the business of L. & A., and that K., the senior partner, had last fall warned L. against A: that he did believe at the time that K. & D. would sanction any instruction he gave in their name; and he still believed they would have done so but for the fact that A. had gone to Rochester, and had paid the claim of K. & D. in full by an endorsed note.

The attorney's affidavit denied in terms any malice or

ill-will towards G. W. A., and stated that he had never had any occasion for such feeling, and that his sole object throughout had been to serve his client and not to harrass or ruin Mr. A. or injure him in his credit or reputation. This affidavit also shewed that the attorney had paid fifty dollars to G. W. A. as and for costs of the Insolvency proceedings, including \$23 for expenses of G. W. A. going to Rochester to see K. & D.

The attorney put in several affidavits, from which it was clear that G. W. A. was mistaken in the attorney having been concerned in the proceedings against him in the magistrate's court; and that a different counsel, who also testified to the fact, had been employed.

In this term, *Harrison*, Q. C., shewed cause. The applicant suppressed, on making this motion, the facts that he went to Rochester and called on K. & D.; and that the attorney had paid all the costs of the insolvency proceedings, and even the expenses of the applicant to Rochester. He does not, therefore, deserve much consideration at the hands of the Court. The attorney's affidavits satisfactorily explain how the name of K. & D. was used. It was used at the instance of the applicant's partner, with the idea that the use was authorized, and was dropped at the first suspicion that it was not so authorized, and every amend possible in the shape of paying costs, &c., has been made. And A. was told by the attorney that L. had authorized him to use the names of K. & D. before this application was made, and so the application ought not to have been made. The affidavits deny malice, and the facts support the denial. There is no direct evidence of a conspiracy to harrass; and nothing should be presumed against the attorney: *Re Attorney*, 14 C. P. 323, 327. If the attorney had used K. & D.'s name without authority, that could have afforded no ground for striking him off the rolls: *Re Davies*, 1 L. & M. (Bail Court,) 207; *Re Cutts*, 16 L. T. N. S. 715; *Hubbart v. Phillips*, 13 M. & W. 702; *Hammond v. Phillips*, 1 C. M. & R. 64; *Shaw v. Ormiston*, 2 P. R. 152; *Re Gray*, 20 L. T. N. S. 730. There is no doubt that K & D.. would have

ratified the attorney's act, but for the payment to them by the applicant. As to the suppression of facts, he also cited *Re —*, 1 Dowl. 174.

Bethune supported the rule. The case of *Re Gray*, 20 L. T. N. S. 730, is applicable. It is the latest case on the point, and is well borne out by previous authorities. The facts shew there must have been a strong feeling on the part of the attorney. His letter to K. & D. also shews that. If his conduct be not shown to be *malá fide*, he is nevertheless liable to be struck off. The cases of *Re Davies*, 1 L. & M. (Bail Court), 207, and others cited by *Mr. Harrison*, were either different in their facts or else overruled by subsequent cases. Some of the other authorities on this question are *Stephens v. Hill*, 10 M. & W. 28, *Re Collins*, 24 L. J. Ch. 732; *Re Cutts*, 16 L. T. N. S. 715; *Russell on Crimes*, vol. 1, 4th ed., 267; *Reynolds v. Howell*, L. R. 8 Q. B. 398; *Re Stewart*, L. R. 2 P. C. 88; *Re Hill*, L. R. 3 Q. B. 543; *Bayley v. Buckland et al.*, 1 Ex. 1, 5 D. & L. 115.

RICHARDS, C. J., delivered the judgment of the Court.

There is no doubt that the attorney gave a notice to the complainant in this matter, as a member of the firm of L. & A., requiring the members of that firm to make an assignment under the Insolvent Act of 1869. He signed to that notice the name of R. & W. & Co., and K. & D. per the attorney, and served the same on the members of the firm of L. & A., with a view of putting them into insolvency. He was no doubt authorized by R. W. & Co. to take this course. He was not authorized by K. & D. to do so.

A. states in his affidavit that he believed the demand to assign in insolvency, was made upon him with the knowledge of his partner L., and by the advice of the attorney, solely for the purpose of annoying, harrassing, and if possible of ruining him and his credit and reputation.

It is very apparent that L. & A. were not on friendly terms; that a good deal of litigation of various kinds, in

which they were interested, had taken place before these proceedings were had, and the attorney acted for Mr. L., and in an interest antagonistic to Mr. A. No doubt Mr. A. thought that the attorney was taking an unusual interest in these proceedings, as they affected him, and he attributes unfriendly feeling in consequence.

It thus clearly appears that the attorney did use the name of K. & D. without their authority, and in a matter likely to be injurious to Mr. A., and in this respect he did that which was improper, and for which he could properly be called to account by the court.

The importance of attorneys having due authority to act, is apparent from the case of *Bayley et al. v. Buckland et al.*, 1 Ex. 1, and note to the American Edition.

Mr. A. further urges, in effect, that the attorney was actuated either by a malicious desire to injure him, or to aid L. in that desire.

Now, what answer does the attorney make to this? He says in effect, I thought as L. had gone into insolvency, and I had a demand against the firm of L. & A. for Messrs. R. W. & Co. of Albany, it would be for the interest of my client that the firm of L. & A. should be placed in insolvency; but as R. W. & Co.'s demand was not large enough to compel L. & A. to make an assignment, I asked Mr. L. if there were any of their creditors whom he knew well enough to authorize me to use their name to make the demand to assign referred to. He said, you may use the name of K. & D.; that he knew them intimately, and he knew anything he, the attorney, did in that matter for them, they would sanction.

On this, he signed their name, with that of R. W. & Co., to the demand, and had it served on L. & A.

He, however, wrote to them on the same day, stating what he had done, wishing to know if they would sanction the use of their name, and requested the favor of a reply. Not having obtained the sanction required, he abandoned the proceedings in Bankruptcy; he paid the costs, and amongst other charges, paid a sum of about \$23, to pay Mr. A. for

his time and expenses in going to Rochester to procure the necessary affidavit to set aside the irregular proceedings.

The course taken by the attorney in this matter, was very indiscreet. He knew that L. was the person who had undertaken to pay the debts due by the firm of L. & A. He knew there was unfriendly feelings existing between them. He knew he had acted in many matters where there were strong feelings between the parties, for Mr. L. and against Mr. A.

That he should take the authority of Mr. L. for using the names of third parties, in a proceeding which was very adverse to Mr. A., for the non-payment of debts which Mr. L. himself ought to have paid, to say the least, exhibited great want of judgment, and naturally induced Mr. A. to think there was some feeling stronger than a mere desire honestly to serve the interests of Messrs. R. W. & Co. and K. & D.

The attorney says in his affidavit, that the belief asserted by Mr. A. in the twelfth clause of his affidavit, so far as he was concerned, was utterly without foundation; that he had no object in view but to serve his clients in a manner and way which he believed best for their interests; and the thought of annoying, harrassing, or ruining Mr. A., or injuring him in his credit and reputation, never entered his head.

Mr. *Harrison* urged that the attorney told A. before this application was made, that L. had authorized him to use the name of K. & D., and inasmuch as A. had not stated this fact on the application, we should discharge the rule and make him pay the costs.

It does not surprise us that Mr. A. should not have thought it necessary to inform the court on this application, that the attorney had stated that his former client had authorized an act to be done which was, if anything, in the interest of Mr. L. himself, and hostile to Mr. A. He seems to have thought both L. and the attorney were acting together to injure him in that very matter.

One of the latest cases on the subject of the unauthor-

ized use of the name of a party by an attorney, is *Re Gray*, 20 L. T. N. S. 730, where Lord Romilly said, at p. 731: "As long as the system continues which makes it impossible, or nearly so, for the parties to a cause to appear in person in the conduct of the cause in which they are engaged, the court is obliged to rely on the representation of a solicitor that he has the retainer of the client in whose name he files a bill, and, fortunately, such is the honour of solicitors, that it is the rarest of things that the fact of the retainer is ever in question.

* * If it were necessary to investigate the existence of an authority to file the bill before a suit could proceed, irreparable injury might arise in a variety of cases. It is, therefore, the duty of every solicitor to make himself certain on this point. Lord Langdale was of opinion that no bill ought to be filed without a written retainer, but unquestionably if it be not a written retainer, there must be an authority to institute the suit communicated expressly by the client to the solicitor without any *intermediate* agency. The conduct of Mr. Gray in this matter, is, in my opinion, inexcusable."

It further appeared in that matter, that he had permitted his client to state a fact he knew to be false, in an affidavit prepared and used in the course of the cause. He was suspended for ten years.

Unless some serious injury had been caused by the unauthorized and improper use of the name of a party by an attorney, I do not suppose that the Courts would resort to so serious a course as to suspend for ten years or strike an attorney off the rolls. At the same time, I think when such a course has been taken by an attorney, and the fact is brought to the knowledge of the Court by parties who consider themselves aggrieved, the onus is cast on the attorney to satisfy the Court that he has not been actuated by any bad motive in what he has done, and has only committed an error, though a grave one considering his position, duties, and responsibilities.

When the explanation is given, it is then for the Court

to decide if the party applying was justified in bringing the matter before the Court.

Here the attorney, by his oath, has emphatically denied that he was influenced by a desire to injure Mr. A.; that he took the course he did for the purpose of serving the interest of his client; so in that respect I think we ought to give him the benefit of the statement he has made.

But when he says that he told Mr. A. that L. had authorized him to use the name of the Rochester firm as a justification for doing so, and so that A. ought not to have made this application, I think we cannot properly give effect to that suggestion.

Under all the circumstances he should have been exceedingly cautious in taking Mr. L.'s authority as sufficient to justify him in using the name of a third party in any matter in which Mr. A. was concerned.

If he deemed the matter so pressing, that he could not wait for an answer to a letter, he could have used the telegraph; the expense would not have been very great, and the doing an unauthorized act which might have been very injurious in its consequences to another, might have been avoided.

On the whole, we do not think we ought to discharge this rule without making the attorney pay the costs.

We think it desirable that the officers of this Court should understand, if they take upon themselves the responsibility of acting in a professional character without due authority, that parties who are prejudiced by these acts ought not to be discouraged from bringing such matters to the notice of the Court by being compelled to pay their own costs. Where parties have reasonable grounds for bringing these matters before the Court, as we think Mr. A. had in this case, and when the act was quite unauthorized, as it must be admitted it was here. We think we must make the attorney pay the costs. Lord Romilly, in the case referred to, says at page 732, "The authority to institute the suit should be communicated expressly by the client to the solicitor without any intermediate agency."

We have looked at the affidavits and the letter from

K. & D. to the attorney, put in on the argument by Mr. *Harrison*, though perhaps not properly before us, but do not think the facts there referred to, any more than what was before stated, justified the use of their name in this matter. These parties would probably have approved of what the attorney did for them, if they had thought it their interest to do so, but what the attorney should have done, and what his duty required was, that he should have ascertained that he was *authorized* to act for them before he presumed to do so, and then he would have avoided all difficulty.

The rule will be discharged, but the attorney will be ordered to pay the costs of this application.

Rule discharged accordingly.

DRAKE QUI TAM V. PRESTON.

Omission to return conviction—Penal action for—Statutes—Form of declaration—32—33 Vic. ch. 31, D.—33 Vic. ch. 27 D.—C. S. U. C. ch. 124—32 Vic. ch. 6, O.—Construction of.

Declaration—That defendant and W. C., then being two Justices of the Peace for, &c., on the 30th December, 1872, convicted the plaintiff and J. & D. of an offence of which they stood charged by E. C., and adjudged each of them for the said offence, to pay \$1, to be paid and applied according to law, and costs; and thereupon it became the duty of defendant and W. C. as such Justices, to make a joint return in writing of the said conviction, to the Clerk of the Peace for, &c., on or before the 2nd Tuesday in March, 1873, according to the form of the Statute in such case made and provided, yet they did not, nor did either of them, as by the said Statute in that behalf required, make any return of the said conviction to the said Clerk of the Peace, on, &c., “contrary to the said statute,” whereby and “by force of the statute in that behalf,” the defendant forfeited \$80, and an action has accrued to the plaintiff, who sues for the same “under the said statute,” to demand and have from the defendant the sum of \$80.

Held, on demurrer, declaration bad; for it should have alleged defendant's neglect to have been contrary to the Statutes, not merely the Statute, there being two Statutes upon the subject, each requiring a different return.

Held, also, that the plaintiff might sue for himself only, and need not sue *qui tam*.

Held, also, that an action would lie against each magistrate for the penalty, for though in form in debt, the action was in fact *ex delicto*.

Quære,—there being now some offences under the jurisdiction of the Dominion, and some under that of Ontario, and a different return required, and a different penalty imposed, as regards each class,—whether the declaration should not state the nature of the offence and that it was within the Magistrate's jurisdiction, though formerly this was not requisite.

DEMURRER—Declaration—For that the defendant and one William Craig, then being two of Her Majesty's Justices of the Peace in and for the United Counties of Northumberland and Durham, on the 30th December, 1872, at the township of Manvers, in the County of Durham, convicted the plaintiff, one Henry Ruttan Jones, and one Edward Desborough, of a certain offence whereof they then stood charged before the said Justices, on the information and complaint of one Eunice Cowden, and adjudged each of them, the said plaintiff, the said H. R. J. and the said E. D., for the said offence to forfeit and pay the sum of \$1, to be paid and applied according to law; and also adjudged them, the said plaintiff, the said H. R. J. and the

said E. D., to pay to the said E. C. the sum of \$18.21, for her costs in that behalf; and thereupon it became and was the duty of the defendant and the said William Craig, so being such justices as aforesaid, to make a joint return in writing of the said conviction to the Clerk of the Peace for the United Counties of Northumberland and Durham, on or before the second Tuesday in March, 1873, according to the form of the Statute in such case made and provided; yet the defendant and the said William Craig did not, nor did either of them, as by the said Statute in that behalf required, make any return of the said conviction to the said Clerk of the Peace, on or before the second Tuesday in March, in the year 1873, contrary to the said Statute—whereby, and by force of the Statute in that behalf, the defendant became liable to forfeit, and forfeited the sum of \$80, and an action hath accrued to the plaintiff, who sues the defendant for the same in this action under the said Statute, to demand and have from the defendant the said sum of \$80.

Demurrer, on the grounds: 1. That the declaration is not founded on or authorized by any Statute.

2. That the plaintiff declares for the entire penalty in his own right and behalf, while by the Statute in that behalf he is only entitled to one moiety thereof in his own right and behalf.

3. That the declaration should have alleged, but does not allege, that the plaintiff sues as well for Her Majesty's Receiver General for the public uses of the Dominion as for himself. Joinder.

The following grounds were also argued, though no notice had been given of them: that the declaration does not shew the nature of the offence whereof the Justices convicted the plaintiff and the others, nor otherwise shew that the conviction was one which the defendant was bound to make a return of; and that it appears from the declaration, that William Craig was jointly liable with the defendant to pay the said debt, yet he has not been joined as a defendant.

Kingstone, for the demurrer. There are two Statutes of the Dominion—32 & 33 Vic. ch. 31, secs. 76–78, and 33 Vic. ch. 27, sec. 3, governing this case. The declaration should, therefore, have alleged the defendant's neglect to have been contrary to and a violation of the Statutes in that behalf, and that the plaintiff became entitled to proceed for the penalty by virtue of the Statutes, and not merely as contrary to the Statute: *Fife v. Bousfield*, 6 Q. B. 104. By the Consol. Stat. U. C. ch. 124, sec. 2, where two Justices joined in a conviction, each of them was subjected to the full penalty of \$80, for not returning the conviction; while by the Act of 1869, sec. 78, where two Justices join in a conviction, and they neglect to make a return of it, they are liable to pay only the one sum of \$80.

The Justices, where both are in default, as it appears they were here, must both be sued. The one cannot, in such a case, be proceeded against alone for the entire penalty: *Rex v. Clark*, Cowp. 610, 612. The plaintiff should have sued *qui tam*, and not for himself alone. By the same 78th section, any person may sue for the penalty; "one moiety whereof shall be paid to the party suing, and the other moiety into the hands of Her Majesty's Receiver General, to and for the public uses of the Dominion:" 1 *Bac. Abr* 74, Tit. "Actions *qui tam*, A." If the plaintiff do not sue *qui tam*, he should demand only his own moiety of the penalty: 2 *Hawk. P. C.* 371, ch. 26, sec. 21; *Pie v. Westly*, Hob. 245. The non-joinder of Craig, the other Justice, may be taken advantage of by demurrer, because the objection appears on the face of the declaration, and it is a valid objection: *Bristow v. James*, 7 T. R. 257; *Rex v. Young et al.*, 2 Anstr. 448; *Rex v. Chapman et al.*, 3 Anstr. 811. See also *Ranney qui tam v. Jones*, 21 U. C. R. 370.

Armour, Q. C., contra. It was not necessary to aver the breach of duty to have been contrary to the Statutes. The whole liability arises under the Act of 1869. The later Act alters only the time for making the return. The plaintiff is not compelled to proceed in the one action against the two Justices; their breach of duty was a tort, in which

case the remedy is several as well as joint : *Metcalf qui tam v. Reeves*, 9 U. C. R. 263 ; *Barnard v. Gostling*, 2 East. 569 ; *Chitty on Plead.*, 7th ed. 45 ; the plaintiff is not obliged to sue *qui tam* : *Bagley qui tam v. Curtis*, 15 C. P. 366. He may sue for a recovery of the whole penalty, but he will only receive his own share. The nature or cause of the conviction need not be stated : *O'Reilly qui tam v. Allan*, 11 U. C. R. 411 ; *Keenahan qui tam. v. Egleson*, 22 U. C. R. 626. He asked leave, if necessary, to amend.

WILSON, J., delivered the judgment of the Court.

The case of *Bagley qui tam v. Curtis*, 15 C. P. 366-368, shews that the plaintiff, in a case like this, need not sue *qui tam*. In addition to the cases mentioned there, I refer to *Waterhouse v. Bawde*, Cro. Jac. 133, 134, where it is said, if a Statute prohibit an Act, and attach no penalty to it, that if any one sue on the Statute, he must proceed *qui tam*, because the king is to have a fine ; and to *Frederick v. Lookup qui tam*, 4 Burr. 2018, where it is said, if the penalty is distributable between the informer and the poor of the parish, the plaintiff need not sue *qui tam*.

"The Statute 9 Anne, ch. 14, sec. 2, empowers any person to sue for and recover the money ; and then directs that a moiety of it shall be 'to the use of the poor of the parish where the offence shall be committed.' Therefore, the declaration may be laid either 'to render to the informer only,' or 'to render to the informer and the poor,' and consequently so may the judgment be likewise." *Ibid*.

So here the Consol. Stat. U. C. ch. 124, sec. 2, and the Dominion Act of 1869, authorize any person to sue for the recovery of the \$80 ; and when it is recovered, one moiety of it shall belong to himself, and the other moiety be paid to the Receiver General.

It was also argued that the declaration was bad, for not averring that the act was omitted to be done contrary to the Statutes, in place of according to the Statute.

No notice was given of this exception by the defendant to the Court, but if objectionable at all, it is fatal even in

arrest of judgment in England; and, as that is so, according to *Fife v. Bousfield*, 6 Q. B. 104, we may, as it was argued, consider it and dispose of it.

In the case just mentioned, judgment was arrested, because the declaration did not aver the act to have been done contrary to the Statute; and it was held that the allegation that the cause of action accrued to the plaintiff by virtue of the Statute in that behalf, did not help it.

So, if the penalty be given by one Statute, and the right of action by another, the allegation must refer to both Statutes, and referring to one only would be objectionable. It was so held in error in *Lee v. Clarke*, 2 East 333.

When, however, one Statute gives the penalty and remedy, and the other shows only in what time the action shall be brought, and that he shall first do a certain act before he shall have an action, the conclusion is properly to the Statute, and not to the Statutes: *Andrews v. The Hundred of Lewknor*, Cro. Jac. 187; 2 Wms. Saund. 377, note 12.

The declaration does not shew what the nature of the offence was with which the persons were charged before the magistrates; it merely says, the Justices convicted the parties "of a certain offence, whereof they then stood charged before the Justices, on the information and complaint of one Eunice Cowden, and adjudged each of them the said * * * for the said offence to forfeit," &c.

There are some offences which are crimes, and some which are not; and there are some offences which must be prosecuted under the Dominion Statutes, and some which may be prosecuted under the Ontario Statutes.

Whether this offence, of which the parties were convicted, was within the Dominion jurisdiction, or within the Ontario jurisdiction, we have no means of saying.

It was decided under the law of Upper Canada, at a time when there was only the one Statute, that the declaration need not disclose the nature of the offence, nor allege that it was one over which the convicting Justices had jurisdiction: *O'Reilly qui tam v. Allan*, 11 U. C. R. 411; *Keenahan qui tam v. Egleson*, 22 U. C. R. 626.

Whether these decisions can be followed now, under the different and divided jurisdictions, may be necessary to be considered.

We are not required to determine that at present, because the decision we pronounce is equally fatal to the declaration, whichever of these powers had or has authority over the offence.

There are two Statutes of the Dominion Legislature, the one of 1869, and the other of 1870 ; and it is necessary to refer to both of them, in order to ascertain what the duty of the Justices was and is.

The Act of 1869 requires the return to be in writing, and to be a joint return ; and the Act of 1870, requires that the return shall be made, not to the General or Quarter Sessions of the Peace, as the Act of 1869 did, but to the Clerk of the Peace or other proper officer, and on different days and times from those which were mentioned in the Act of 1869.

If the declaration had alleged " that it thereupon became and was the duty of the Justices to make a joint return in writing of the conviction according to the Statute, but they did not do so ; and to make the same to the Clerk of the Peace, on or before the second Tuesday in March, according to the Statute, but they did not do so," the Court would have made the reference in the one case to the one Statute, and in the other case to the other Statute ; that is, have applied each reference to the proper Statute according to the fact, and the pleading would have been sufficient : *Clanricarde v. Stokes*, 7 East 516.

But the declaration is not in that form. It is, that it thereupon became and was the duty of the Justices to make a joint return in writing of the conviction (which is the requirement of one Statute ; and it continues on and) to the Clerk of the Peace, on or before the second Tuesday in March, according to the *Statute* (which is the requirement of another Statute) ; yet they did not, as by the *said Statute* in that behalf required, make any return of the conviction to the Clerk of the Peace, on or before the second Tuesday in March, contrary to the *said Statute*.

So that it is quite plain, according to the authorities, which we regret to be forced to follow, that the declaration should have reference to the two Statutes, as the days and times in the second Act are a material part of the Justice's duty : *Hunt v. Hibbs*, 5 H. & N. 123 ; and because it does not, we must hold it to be insufficient as respects the enactments of the Dominion Statutes.

Then as to the Upper Canada and the Ontario Legislature.

The Consol. Stat. U. C. ch. 124, is still in full force, as to all convictions over which this Province has jurisdiction. By that Act the return, where the conviction was by two or more Justices was to be "an immediate return" to the General Quarter Sessions of the Peace ; and by the 32 Vic. ch. 6, sec. 9, sub-sec. 4, the return is now to be made to the Clerk of the Peace, and to be made quarterly on or before the second Tuesday in March, June, September, and December in each year.

So that the duty of the Justices is also as to Ontario contained in two Statutes, to both of which reference should have been made, as before stated.

It was argued as if all the legislation on this subject were of universal application, as well to the Dominion as to the Ontario convictions ; but that is not so. There is a parallel line of legislation nearly alike, but not wholly so.

The Dominion Legislature has made a single penalty of \$80 the maximum fine for any default, whether it be committed by a single Justice, or by two or more.

The Ontario Legislature has left the penalty as it was, not for the default, but upon each Justice who has made a default.

In the former case, when two or more Justices act and are in default, the penalty on all is single, only \$80. In the latter case the penalty is \$80 upon each Justice who is in default.

Then, as to the joinder or non-joinder of all the Justices who made the conviction in one action.

If the proceeding were for a Dominion matter, all of the Justices could have been joined ; but I think it was not

necessary to join them all. The action, though in debt in form, is in fact *ex delicto*. If both were joined, the verdict might be in favour of one and against the other.

In *Bristow v. James*, 7 T. R. 257, the action of debt under the Statute of Anne, to recover back money won at play, was held to be an action of debt, because an action for money had and received could be maintained for it, and not an action *ex delicto*; and therefore a plea in abatement for non-joinder of a defendant was a good plea.

In the two cases cited from *Anstruther*, the proceedings were plainly matters of contract.

In *Barnard v. Gostling et al.*, 2 East 569, and the authorities there cited, and among them the case of *Hardyman v. Whitaker et al.*, at p. 573, note *a*, it is shewn this proceeding is a tort, in which the remedy is joint and several, and not a contract, that both might have been charged in the one action. See also 2 Wms. Saund. 117 *b*, 117 *c*, notes; that in such a case, one might be found guilty and the other acquitted; that only the one penalty is recoverable against the two. And I think it also appears that, as each of the two might be guilty of not making the return, each may be liable for the penalty; but as the act to be done is single in its nature, to make a return, for that can be only one return, a joint return; and if that be not done, the one forfeiture, the single payment of the penalty, will acquit the two.

The case of *Barnard v. Gostling*, 2 East 569, was reversed in error on the principal point; that is, that in the case there stated, the two persons sued could not be joined in the same action; 1 B. & P. N. R. 245. I refer also to *Rex v. Clark*, Cowp. 610.

The plea of not guilty is also pleadable in an action for penalties: *Faulkner v. Chevell*, 5 A. & E. 213; *Coppin, qui tam v. Carter*, 1 T. R. 462; *King v. Share*, 3 Q. B. 31 note *a*.

The plaintiff might, therefore, in a Dominion matter, proceed either against all the Justices in the one action, or against any one of them at his election.

In a conviction under the Ontario legislation, each Justice is liable for the penalty, and must be so proceeded against as heretofore : *Metcalf qui tam. v. Reeve et al.*, 9 U. C. R. 263.

It may be proper, under the different enactments of the two Legislatures, to shew the nature of the offence for and upon which the conviction was made ; otherwise we shall not, in the case of two Justices, know whether there is to be a separate penalty on each Justice, or a single penalty against both for the one default ; or whether they should be joined or should not be joined in the same action.

In this case, as before stated, that point does not arise. We decide this wholly upon the objection that, under whichever Legislature this conviction was made, the declaration should equally have alleged the omission on the part of the defendant to have been an omission contrary to the Statutes in that behalf.

We may refer also to *King v. Share*, 3 Q. B. 31 ; *King v. Burrell*, 12 A. & E. 460.

There will be judgment therefore for the defendant on demurrer.

Judgment for defendant.

RE PROPER AND THE CORPORATION OF THE TOWNSHIP OF OAKLAND.

Union of school sections—Right of appeal under 34 Vic. ch. 33, sec. 16, O. —Statutes, construction of—Retrospective effect.

By 34 Vic. c. 33, s. 16, "the majority of the trustees or any five rate-payers of a school section, shall have the right of appeal or complaint to their County Council against any by-law or resolution which has been passed or may be passed by their Township Council for the formation or alteration of their school section," &c.

In 1858 two school sections in a township were united by by-law, pursuant to 13 and 14 Vic. ch. 48, sec. 18, and remained so, the old separate school houses having been sold and a new one built, &c., until January, 1873, when a petition was presented under 34 Vic. above cited, to the County Council for the disallowance of said by-law, and the matter was referred to a committee, as directed by that statute, which disallowed the by-law of 1858. The Township Council thereupon passed a by-law, among other things, to raise \$270 by a rate on one of the original sections for public school purposes in said section. *Held*, that such petition and subsequent proceedings were not authorized by the 34 Vic. ch. 33, s. 16, under the circumstances set out; and that the by-law, being based upon their validity, must be quashed.

Semble, that the section could not be held to be so far retrospective as to authorize the appeal from and disallowance of the by-law uniting the sections, after it had been for so many years passed and acted upon.

Quære, whether the words in the section, "for the formation or alteration of their school section," include a by-law for the union of school sections.

Held, that the right of appeal was given by the section only to persons who were trustees or ratepayers of the section when or after the statute came into force.

Semble, also, that there could be no right of appeal here, for the petition admitted that the union complained of was desirable when formed in 1858, but alleged that it had ceased to be so, owing to a change of circumstances.

DURING this term *C. Robinson*, Q. C., obtained a rule *nisi* calling on the Corporation to shew cause why by-law No. 23, passed on the 12th September, 1873, entitled a by-law to levy rates and assessments upon the ratable property in the Township of Oakland, for county and public school purposes; and a special rate upon all the ratable property of school section No. two (exclusive of the territory embraced in school section No. four, prior to the union of said sections Nos. two and four), in said township, for public school purposes within the said school section, for the current year; or why the third section of the by-law, enacting

that the sum of \$270 should be assessed, levied, and collected upon all the ratable property of school section No. two (exclusive of the territory as above mentioned), and so much of the fourth section of the by-law as relates to the said sum of \$270, should not be quashed with costs—on the grounds that the by-law does not direct the said sum of \$270 to be levied upon the whole of the taxable property in the school section No. two, but only on a part thereof; and the by-law is not in accordance with, but contrary to, the request of the trustees of said school section No. two, and is unauthorized by any application made by the trustees of school section No. two to the Corporation.

The rule was drawn up on reading the by-law and affidavits, &c., filed.

From these papers and affidavits it appeared that in February, 1858, in the Township of Oakland, there were two school sections, numbered two and four: that under the provisions of 13 & 14 Vic. ch. 48, sec. 18, at the request of a majority of the freeholders and householders in each of those sections, the Council of Oakland, by resolution passed on the 20th February, 1858, united and constituted those two school sections as one school section, to be known as school section No. two; that since the union those original sections had been assessed as one section; that the old school houses and property of the separate sections were sold, and a new site was purchased, and a school-house erected about the centre of the present union school section two, at which the children of the inhabitants of the original sections two and four attended.

It further appeared that on the 28th of January, 1873, a resolution was passed by the Municipal Council of the County of Brant, that the petition of Albert Chatterton and others, ratepayers of school section No. two of Oakland, be granted, and a committee of three were appointed, in conjunction with the County Judge and the County Inspector appointed by statute, to investigate the matter of said petition, and confirm or disallow the by-law therein mentioned, as the interests of right and justice might require.

That petition was signed by certain rate-payers of the united section number two, and set out that some years ago a school section number four, to which the petitioners belonged, was attached to and made a portion of section No. two: that at the time of such union it was deemed prudent, and in the interests of all concerned, that the union should take place, and that a by-law was passed for that purpose; that owing to the increased school population it had become necessary, in the interest of the petitioners, that school section No. four should be withdrawn from section No. two, and restored to the position it occupied before such union; but that the petitioners, being in a minority, were without remedy, and had to submit to a continuance of such union. and they prayed that under the provisions of sec. 16 of 34 Vic. ch. 33, O., steps should be taken to have the by-law uniting the sections disallowed.

It also appeared that on the 12th of April, 1873, by a document signed by the committee so appointed,—after reciting that by virtue of 34 Vic. ch. 33, sec. 16, O., entitled “An Act to improve the Common and Grammar Schools of the Province of Ontario,” they were a committee to investigate the matter of the petition of Albert Chatterton and others to disallow the by-law or resolution of the Municipal Council of Oakland, passed on the 20th of February, 1858, to unite school sections two and four, and to confirm or disallow such by-law or resolution; and that they had heard the parties, &c.,—the committee disallowed such by-law or resolution.

It further appeared that on the 12th September, 1873, the Municipal Council of Oakland passed the by-law now in question, and by the third section of such by-law it was enacted that the sum of \$270 should be assessed, levied, and collected upon all the ratable property of school section No. two (exclusive of the territory embraced in school section four, prior to the union of said sections two and four, of the said Township of Oakland), for public school purposes within said section.

During this term *M. C. Cameron*, Q.C., shewed cause. The by-law moved against is valid, for the school section in which it directs the rate to be levied was properly formed. Sec. 16 of 34 Vic. c. 33, O., applies to this case, and the proceedings under it have been regular. The section is clearly retrospective; it gives the right of appeal against any by-law "which *has been passed* or may be passed," and whatever may have been the intention these words are sufficient to exclude all doubt. The Township Council have treated the disunion as coming into force at once, and have directed a levy in one of the sections. The case is not within sec. 40 of Con. Stat. U. C. ch. 64.

C. Robinson, Q.C., contra. The words, "which has been passed," in sec. 16 do not necessarily make the section retrospective, at all events to the extent contended for here. The effect of allowing a by-law to be disallowed under it after fifteen years, and after money has been expended and school sites sold and purchased under it, would be monstrous, and cannot have been intended. *Vansittart v. Taylor*, 4 E. & B. 910; *Thompson v. Lack*, 3 C. B. 540; *Marsh v. Higgins*, 9 C. B. 551; and *Wright v. Hall*, 6 H. & N. 227, all shew how unwillingly the Courts give a retrospective effect to statutes. Moreover, this disallowance is in effect an alteration of the boundaries of a school section and the separation of one section from the union, and C. S. U. C. ch. 64, secs. 40-47, have not been complied with. All parties have not been notified, and the alteration is to go into effect at once. If the union has not been dissolved, there can of course be no rate levied on part of it. *Harling v. Mayville*, 21 C.P. 499, 508; *Gillies v. Wood*, 13 U. C. R. 357; *Haacke v. Marr*, 8 C. P. 441, 444; *Patterson and the Corporation of the Township of Hope*, 1 U. C. R. 360; *Shaw and the Corporation of the Township of Manvers*, 19 U. C. R. 288. See also, as to delay in moving against by-laws: *Leddingham and the Corporation of the Township of Bentinck*, 29 U. C. R. 206.

Further, this was not in fact an appeal at all. The petition set out that the union was prudent and desirable in

1858, when it was formed, and the only ground on which the petitioners now wish to have it dissolved is, the change of circumstances which has since taken place. This plainly shews that the case is not within the section, and that the dissolution must be effected, if at all, by different means.

MORRISON, J., delivered the judgment of the Court.

The by-law moved against recognises, or rather is passed upon the assumption, that the disallowance of the resolution of the 20th February, 1858, by the committee to whom it was referred by the County Council, disunited the two original school sections, Nos. two and four, and placed them as they existed previous to February, 1858; and the first question we have to determine is, whether the reference of the matter of the petition to the committee, and their disallowance of the resolution, were authorized and warranted by the provisions of sec. 16 of 34 Vict., ch. 33, O.—in other words, whether this resolution of the Municipal Council of Oakland, of 20th February, 1858, was appealable against under that section.

Sec. 16 enacts that, "The majority of the trustees, or any five rate-payers of a school section, shall have the right of appeal or complaint to their county council against any by-law or resolution which has been passed, or may be passed, by their Township Council for the formation or alteration of their school section; and it may and shall be lawful for such county council to appoint a committee * * * to investigate the matter of such appeal or complaint, and confirm or disallow the by-law or resolution complained of; * * * Provided always, that no person shall be competent to act on either of the committees mentioned in this clause of this Act, who was a member of the Township Council that passed the by-law or resolution complained of; and provided also, that the alterations made in the boundaries of any school section by such committee shall not take effect before the end of the year during which they shall be made, and of which alterations due notice •

shall be given by the inspector to the clerk of the township and to the trustees of the school sections concerned; Provided furthermore, that the school boundaries of a village, existing at the time of its incorporation, shall continue in force, notwithstanding its incorporation, until altered under the authority of the school laws."

From the language of this section, it is difficult to say clearly what was the intention of the Legislature; whether it was meant that the section should have a general retro-active effect, or only to a limited extent, or that it should only apply to by-laws passed after the statute.

I cannot think it was intended that the operation of the clause should be retrospective to the extent contended for, or that the Legislature contemplated, that by-laws passed years before, under the authority of which school sections had been formed, altered, and united, school houses erected, moneys expended, and various interests grown up, should, as a matter of right, be the subject of appeal, with a view to such by-laws being disallowed, at the instance of five rate-payers residing within what formerly constituted a school section, and who may not have been rate-payers or even residents in the section or township when the by-law passed, the Legislature, in the event of the disallowance of the by-law, making no provision for the disposition of the acquired property, &c.

But as the words, "which has been passed," are found in the clause, words in themselves having a retrospective meaning, we have to consider the context and the circumstances, to see if these words can be reasonably applied and be given effect to in a limited sense.

The cases referred to by Mr. Robinson in the argument shew how reluctantly the Courts give effect to words having a retrospective operation, and how they strive against such a construction, unless the statute clearly indicates that such was the intention.

In *Waugh v. Middleton*, 8 Ex. 352, the words, "Every deed or memorandum of arrangement, now or hereafter

entered into," were used in the statute then under discussion, and it was contended that they should be read as "heretofore." Pollock, C.B., in giving judgment, said, p. 358, "We are of opinion that we are not compelled to read the word 'now' in the sense of 'heretofore;'" * * A very strong reason for holding that the Legislature had not used the word 'now' in that sense is one which my brother Alderson gave in the course of the argument, namely, that if the Legislature intended so to use it, expressions might have been adopted which would have left no possible doubt on the mind of any one desirous of ascertaining what was intended. But there are no expressions that clearly and distinctly indicate the intention of giving effect to deeds that had theretofore been entered into and completed, so as to bind other persons not parties to them. And, in the absence of those expressions, which might have been so easily used, grave doubts may be entertained whether this could have been the meaning; and we are not bound to adopt that which appears to be repugnant to the general usage of Parliament, because an expression has been used, which, if it do mean this, certainly means it by the smallest amount of expression that can be used to convey it." And the learned Chief Baron proceeds to give to the word "now" a modified construction as applying to an inchoate, and not to a perfect arrangement.

In *Marsh v. Higgins, et al.*, 1 L. M. & P. 261, where the same act was under consideration upon another point, Wilde, C. J., said, "The Court is placed in great difficulty by this Act of Parliament, and we are by no means enabled to come to a satisfactory conclusion on many parts of it. But, in construing an Act of Parliament, we must adopt the general principle of legislation and of law, that acts are not to have a retrospective operation unless that effect be given to them by express language. It undoubtedly often happens that the Legislature considers it necessary to give Acts that operation to a limited extent; but the extent to which it is given is expressed in clear language. This Act, for instance, was intended to be

retrospective to the extent of making valid certain deeds made before it was passed. It is, however, contended that it is retrospective in another respect, and in a respect, too, quite inconsistent with the ordinary course of legislation and legal experience. * * * It is sufficient to say that Acts of Parliament are not to be construed as retrospective, except where the Legislature has clearly expressed an intention that they shall have that effect."

And Williams, J., said, p. 263, "The general rule of construction is, that a new law shall be applied to future, and not to past transactions. That rule prevents retrospective operation being given to a statute, except where an intention that it shall have that operation is clearly expressed."

I have very great doubt that the section 16 in question applies to a by-law or resolution passed for the *union* of school sections.

The words used in the 16th section are, "for the formation or alteration of their school section."

Now the School Acts make provision for four different classes of by-laws or resolutions affecting school sections:—

1st. To form new school sections where no schools have been established, under sec. 39 of the School Act, Con. Stat. U. C. ch. 64.

2nd. To alter the boundaries of school sections, by sec. 40.

3rd. For the union of two or more school sections into one section, by sec. 41.

4th. And for the formation and alteration of union school sections, formed by uniting sections in two or more townships, by the 45th section, amended by the Act of 1860, section 5.

And for each case there is prescribed a distinct mode of proceeding; and I think we might properly hold that, as the Legislature was aware of the different specifically named powers given to township councils to pass by-laws or resolutions affecting school sections, that it did not contemplate, as it did not refer to them, that by-laws for

the union of two or more school sections into one should be subject to the appeal given by the 16th clause, as a by-law or resolution passed for the union of school sections was one that was imperative on the Township Council to pass, upon the request of a majority of the freeholders and householders at public meetings, held respectively in each of the sections to be united into one.

But, assuming that the words "formation or alteration" include a by-law for the union of two or more school sections, the words "majority of the trustees or any five rate-payers of a school section," at the commencement of the 16th section, can only refer to trustees and rate-payers who were such at the time and after the statute took effect, and of an existing school section, and as it gives to those trustees and rate-payers the right of appeal against any by-law or resolution "which has been passed," reading these words in connection with the language subsequently used, "their Township Council," and "the formation or alteration of their school section," it seems to me that what was meant was to give an appeal to the existing trustees and rate-payers, at the time of the passing of the Act, whose then school section of which they were trustees or ratepayers was affected by a by-law; for instance, any by-law passed altering their school section before the 15th day of February, 1871, the day the Act came into force, to take effect during that year, or on the 25th December of that year, as provided for by the School Acts.

In the present case the resolution appealed against, and which the County Council referred to the committee, was not one passed affecting or altering the appellants' school section, of which they were rate-payers, but a resolution passed over fifteen years before for the formation of school section two by the union of the then sections two and four, making and constituting it a new section: *McGregor v. Pratt*, 6 C. P. 175; and which union and resolution is represented in the complaint or petition of the appellants to the County Council to have been at the time of its passing a prudent union, and for the interests of all

concerned—a statement in itself, I may remark, which shews that there was no ground of complaint or appeal against the resolution of the 20th February, 1858, and which affords the strongest reason why the resolution should not have been disallowed.

It may now be for the interests of the inhabitants of school section two that it should be divided or otherwise altered, but it must be done by some other mode than by the disallowance of a resolution properly passed so many years ago, under color of a statute not applicable to it. Provision is made by the School Act for the alteration of school sections by Township Councils, after giving due notice to the parties interested. *In re Ness and The Municipality of the Township of Saltfleet*, 13 U. C. R. 408; *In re Ley and the Municipality of the Township of Clarke*, Ib. 433.

Another reason why we should assume that the Legislature did not intend this section to apply to such a by-law is, that the Legislature must have known that by-laws of the nature of those in question should be appealed against as soon as practicable after their passage, so as to avoid the obvious consequences of their going into operation. *Hill v. Municipality of Tecumseh*, 6 C. P. 297.

It would be unreasonable to suppose, in the absence of the clearest and strongest language, that Parliament meant that a by-law which originally formed a school section, say immediately after our Common School Act first came into operation, or fifteen years ago, when the resolution before us passed, should by an *ex post facto* law be appealable against in this summary way and quashed.

It would be more consonant with the course of legislation to give to the section of the statute in question a modified construction, as being applicable to by-laws and resolutions passed, as I have already stated, and so affecting the immediate rights or interests of the appellants who invoke the action of the County Council.

On the whole, we are of opinion that the County Council were not authorized to nominate a committee under the

16th section, and to submit the complaint set forth in the petition mentioned; and that the disallowance of the resolution by the committee was invalid and of no effect. And as the third section of the by-law moved against was based upon that disallowance of the resolution of February, 1858, and appropriated \$270 to be raised upon a particular portion of section No. two, that so much of the by-law should be quashed, and also so much of the 4th section as relates to the \$270, with costs.

Rule absolute.

MEMORANDA.

During the term the following gentlemen were called to the Bar :—

MAXWELL DAVID FRASER, RUPERT ETHEREDGE KINGSFORD, JOSEPH BENJAMIN MCARTHUR, ROGER CONGER CLUTE, CHARLES OAKES ZACHEUS ERMATINGER, NATHANIEL FRANCIS HAGLE.

TABLE OF COSTS

FOR THE

COUNTY COURTS IN ONTARIO.

WHEREAS it is provided by the "Common Law Procedure Act" that the Judges of the Superior Courts of Common Law at Toronto, or any three of them, (of whom one of the Chief Justices shall be one,) may from time to time frame a Table of Costs for the several County Courts, and ascertain, determine, declare and adjudge, all and singular the fees allowed to be taken by Counsel, Attorneys, Sheriffs, Coroners, and officers of the said County Courts respectively, in all matters, causes, and proceedings depending in the said Courts or before the Judges thereof, in all actions and proceedings within the jurisdiction of such County Courts, or of the Judges thereof, and that the Judges so framing or altering such Table of Costs may associate with them, in framing or altering such Table, any one of the County Court Judges appointed to "The Board of County Judges" under the "Division Courts Act."

And whereas the Chief Justice of Ontario, the Chief Justice of the Court of Common Pleas, and the Judges of the Superior Courts of Common Law, at Toronto, have assumed the duties so provided for, and in the exercise of the powers given as aforesaid associated with them in the performance thereof James Robert Gowan, Senior Judge of the County Court of the County of Simcoe and Chairman of "the Board of County Judges."

In pursuance, therefore, of the powers contained in the said "Common Law Procedure Act," the following Table of Costs for the said several County Courts in Ontario has been framed by the said Chief Justices and Judges, and it is determined, declared, and adjudged, that from and after the 1st day of March next all and singular the costs and fees mentioned in the said Table, and no other or greater, shall be allowed in taxation, or taken, or received, by any Counsel or Attorney, Sheriff, Coroner, or officer, respectively, in the said County Courts, for any business by them, respectively, to be done or transacted in the said County Courts, or before the Judges thereof.

WM. B. RICHARDS, C. J.

JOHN H. HAGARTY, C. J. C. P.

JOS. C. MORRISON, J.

ADAM WILSON, J.

THOMAS GALT, J.

JAS. ROBT. GOWAN, Co. J.

Toronto, fifth day of January, 1874.

TABLE OF COSTS.

GENERAL ALLOWANCE FOR PLAINTIFFS AND DEFEND-
ANTS, AS WELL BETWEEN ATTORNEY AND CLIENT,
AS BETWEEN PARTY AND PARTY.

TO THE ATTORNEY.

WRITS.

Summons, including attendance	\$1 00
Concurrent Summons	0 75
Renewed Summons	0 75
Capias.....	1 00
Concurrent Capias.....	0 75
Renewed Capias	0 75
Capias ad Satisfaciendum.....	1 00
Renewed Capias ad Satisfaciendum	0 75
Capias ad Satisfaciendum for the residue	1 00
Renewed do. do. 	0 75
Fieri Facias	1 00
Renewed Fieri Facias	0 75
Concurrent Fieri Facias	0 75
Fieri Facias for the residue	1 00
Renewed do. 	0 75
Special Endorsement of Demand on Writ of Sum- mons	0 75
Writs of Revivor and Attachment, each... ..	1 00
Subpœna ad Testificandum	0 50
Subpœna duces Tecum.....	0 75
(and if above four folios, additional per folio 10 cents.)	
Venditioni Exponas	1 00

All other writs necessary \$1 00

NOTE—The above allowance includes all charges for attendance for the Writ, and delivering it to the officer.

For each copy, including copies of all notices required to be endorsed 0 50
 Service of each "Copy of Writ, if not done by the Sheriff or an officer employed by him, when taxable to the Attorney 0 25
 Mileage per mile for the distance actually and necessarily travelled when taxable to the Attorney 0 10

INSTRUCTIONS TO THE ATTORNEY.

Taking Instructions to sue or defend 2 00

Instructions for Pleadings:

Instructions for Special Affidavits when allowed by the Clerk, and instructing Counsel on Special matters 0 50
 Instructions to Counsel in Common matters 0 25
 Do. for Brief 1 00
 Do. for every suggestion 0 50
 Do. for issue of fact by Consent 0 75
 Do. for suggestion to revive or for suit of revivor when no rule necessary 0 50
 Do. for rule for writ of revivor when necessary 0 50
 Do. to defend Executor after suggestion of death by original defendant 0 50

DRAWING PLEADINGS, &c.

Declaration..... 1 00
 If above ten folios, for every folio above ten, in addition (but in no case to exceed \$2.00 for whole declaration) 0 20
 One or more Pleas, if five folios or under 0 75
 If above five folios, for every folio in addition (but in no case to exceed \$1.50 for pleas) 0 20
 Joinder of Issue, inclusive of copies and engrossing. 0 25
 Demurrer 0 50
 Joinder of Demurrer, inclusive of copies and engrossing 0 25

Marginal statement of matters of Law for argument, exclusive of copy for the Judge	\$0 50
Replications, new Assignment, and other Pleadings, the same as the foregoing charges for Pleas	
Postea, including engrossing.....	0 50
Judgment, whether by default or final	0 50
Authority to receive money out of Court	0 25
Suggestions, Pleas to suggestions and subsequent Pleadings, inclusive of engrossment.....	0 50
Issue for the trial of fact by agreement, for every folio.....	0 20
Special Case, per folio	0 20
Drawing Interrogatories or answers for any purpose required by Law, including engrossing, per folio..	0 20
Particulars of demand, or set-off	0 50
Special particulars of do., per folio	0 20
Bill of Costs	0 50
Copy for the opposite party, each	0 25
Taking Cognovit and entering Judgment thereon, where there has been no previous proceeding and the true debt does not exceed \$200	8 00
For the same services where the true debt exceeds \$200	10 00
Drawing and engrossing Cognovit, and attending execution where there have been previous pro- ceedings	0 75
Instructions for Pleadings in Suit	1 00
Replication accepting money out of Court in full of demand	0 50
Every necessary Letter in the business of the cause	0 25

COPIES.

Declaration, when not exceeding ten folios, each ...	0 75
Do. above ten folios, per folio (but not to exceed \$1.00)	0 10
Pleadings before enumerated	0 40
Issue (Pleadings) if ten folios or under	1 00
If above ten folios, for every folio	0 10
All proceedings, interrogatories, answers and other papers of which copies are to be delivered, per folio.....	0 10
Judgment for non-appearance on Specially endorsed Writs, or Writs of Revivor and in Ejectment, to be taken as ten folios, including the Writ.	

COPY AND SERVICE.

Of Special and Common Rules.....	\$0 50
Of Special Rules, above three folios per folio additional	0 10
Of Summons or Order of a Judge	0 25
Of Order to charge a prisoner in execution	0 50

NOTICES INCLUDING COPY.

To declare, reply, and subsequent proceedings	0 25
By defendant, to bring issue to trial	0 25
Of Appearance, when appearance duly entered and notice given on the day of appearance, but not otherwise	0 25
Of Appearance to Writ of Revivor	0 25
To Plead.....	0 25
Of Declaration, when necessary	0 25
To Sheriff to discharge a prisoner out of custody ...	0 50
Notice in Ejectment to defend for part of premises	0 50
Notice of Claimant's or Defendant's title, same fees.	
Of Trial or Assessment.....	0 25
Demand of residence of Plaintiff and all other common notices, each	0 25
To admit or produce, if not exceeding two folios ...	0 25
For each folio above two	0 10

ATTENDANCES.

Attendance at Judges' Chambers.....	0 50
Attorney attending Court when not himself Counsel or partner of Counsel	1 00
Attendance on Clerk in Special matters.....	0 50
Do. do. ascertaining amount due Plaintiff by a British subject under order of a Judge	1 00
For every hour after the first	0 50
Taxation of costs on Postea.....	1 00
Do. on Judgment otherwise than a Postea ...	0 40
Attendance to file or to serve, to give or receive undertaking to appear when service of process accepted by Attorney, and all other necessary attendances, each	0 25

BRIEFS.

For Drawing Brief not exceeding five folios.....	\$1 00
Do. for each folio in addition.....	0 10
Do. per folio of original and necessary matter.....	0 20
Copies of documents other than Pleadings, when required, per folio.....	0 10

TERM FEES AND OTHER FEES.

Term Fee after Declaration filed.....	0 50
Fee on every Record.....	0 50
Do. Rule of Court or Judge's order.....	0 50
Do. Attending by Counsel or Attorney to hear Judgment of Court, when attendance is noted by Clerk at the time and is necessary..	1 00

AFFIDAVITS.

Drawing Affidavit per folio, special.....	0 20
Copies of Affidavits when necessary, per folio.....	0 10
Common Affidavits of service when necessary, or of payment of mileage, including oath.....	0 70
Mileage on services as on writs of summons.....	

DEFENDANTS.

Appearance.....	0 50
For each additional Defendant.....	0 20

COUNSEL FEES.

Fee on motion of course, or on motion for Rule Nisi, or on motion to make rule absolute, in matters not special.....	1 00
On Special motion for Rule Nisi (Only one Counsel fee to be taxed).....	3 00
(To be increased to \$5.00 in the discretion of the Judge.)	
To attend reference to Clerk when Counsel necessary in opinion of the Judge.....	3 00
On revising Pleadings or Interrogatories, or settling or revising special cases, when necessary in the discretion of the Judge, who shall certify the amount to be taxed before taxation, not exceeding	2 00

Advising on evidence in contested cases, in discretion of the Judge as above, a sum not exceeding	\$3 00
Fee on Argument on supporting or opposing Rules on return of Rule Nisi or argument of Demurrer or special case.....	5 00
(To be increased by Judge in his discretion to a sum not to exceed \$10.00.)	
Fee with Brief on Assessments.....	4 00
Do. do. do. at Trial.....	\$6 to 10 00
(To be increased by order of a Judge in his discretion to a sum not to exceed \$20.00.)	
Fee to Counsel when Counsel attend on argument or examination in Chambers, when in opinion of Judge attendance of Counsel is necessary.....	1 00
(To be increased by order of Judge in his discretion to a sum not exceeding \$4.00.)	
Drawing Bond on Appeal or Bond for Security for Costs.....	3 00
Drawing Bail Piece	1 00
In all applications and proceedings before the County Judges not relating to Suits instituted in any Court of Civil Judicature there shall be payable to the Attorney and Counsel the same fees as in the foregoing Table so far as the same are applicable.	

FEES.

To be taken and received by the Clerks of the several County Courts for their services.

Every Writ Mesne and Final (except subpoena, for which 25c.).....	0 40
Every Concurrent, Alias, Pluries or Renewed Writ	0 40
Every appearance entered, and filing Memorandum thereof.....	0 15
Every appearance, each Defendant after the first...	0 10
Filing every Affidavit, writ or other proceeding or paper.....	0 10
Amending every writ or other proceeding, or paper.	0 25
Every ordinary Rule.....	0 30
Every special Rule, when prepared by the Clerk,...	0 40
Every Judgment by Default	0 30
Every Final Judgment.....	0 50
Taxing every Bill of costs and giving Allocatur...	0 80

Every Reference, Inquiry, Examination, or other special matter referred to the Clerk, for every meeting not exceeding one hour.....	\$0 75
Do. do. for every additional hour or less.....	0 50
For every report made by the Clerk upon such reference, &c.....	1 00
Upon payment of money into Court, for every sum under \$200.....	1 00
Do. \$200 and over.....	2 00
Every Certificate required from Clerk and given...	0 50
Exemplification or Office Copy of Proceedings, per folio.....	0 10
Every Search, if within one year.....	0 10
Every search if over one year and within two years	0 20
Every Search over two years, or a General Search in one cause.....	0 50
Every Affidavit, Affirmation, or Oath administered by Clerk.....	0 20
Entering Satisfaction on Record, and filing Satisfaction Piece.....	0 30
Every Commission for the examination of Witnesses	0 50
Entering Exoneretur on Bail Piece.....	0 20
For making the Entry required in the Debt Attachment Book and in Cognovit Book, each.....	0 50
Every Record entered in the sittings Docket, including Records from the Superior Courts.....	0 50
Every Verdict taken, Nonsuit, Jury discharged, or Record withdrawn.....	0 50
Every Rule or Order of Reference at the trial.....	0 50
Drawing Appointments made by Judge.....	0 25
For Judge's Summons or Fiat, except Fiats for costs, speedy execution or increased Counsel Fee.....	0 25
Judge's Order.....	0 40
For attending at every Special Hearing before the Judge, under the 158th section of "The Common Law Procedure Act," and at taking Examination and Evidence, and at sittings in reference to the County Judge from the Superior Courts, not exceeding one hour.....	0 50
Each additional hour or less.....	0 50
Every Enlargement on Application to Judge in Chambers, or on Return of Summons or otherwise, including search if marked by Clerk.....	0 15
Every Appointment for Taxation of Costs or otherwise made by Clerk.....	0 10

For every Meeting upon Reference under 161st section of "The Common Law Procedure Act," not exceeding two hours.....	\$2 00
For each additional hour or less.....	1 00
(To be taxed by the Judge).	
For ascertaining the amount due by Defendant to Plaintiff, when Judgment signed under Order of any Judge against a British subject out of Jurisdiction in default of Plea.....	1 00
For every Jury sworn.....	0 30
In all Applications and Proceedings before the County Judges not relating to suits instituted in any Court of Civil Judicature, there shall be payable to the Clerks the same Fees as in the foregoing Table, so far as the same are applicable.	

SHERIFF.

Every warrant to execute any process, mesne or final directed to the Sheriff, when given to a Bailiff...	0 50
Arrest, when amount does not exceed \$200.....	2 00
Do. when amount is over \$200.....	4 00
Bail Bond or Bond to the limits.....	1 00
Assignment of the same.....	0 25
Service of Process non-bailable, Scire Facias, or Writ of Revivor (including affidavit of service) each defendant.....	1 00
No fee for Affidavit of service to be allowed in such cases unless service made or recognized by the Sheriff.	
Serving Declarations, Subpœnas, Rules, Notices or other papers (besides mileage).....	0 40
(for each additional party served 25c)	
Receiving, Filing, Entering and Endorsing all Writs, Declarations, Rules, Notices or other papers, each	0 10
Return of all Process and Writs except Subpœna...	0 25
Return of all Declarations, Rules, Notices or other papers.....	0 15
Every search not being by a party to a cause or his Attorney.....	0 30
Certificate of result of such search for each party when required	0 75

A search for a Writ against lands of a party shall include sales under Writ against same party and for the then last six months.

Notice of appointment for ballot of Jury	\$0 25
Notice to Clerk of Peace of such appointment	0 25
Fee on balloting Special Jury	2 50
Fee on striking do.	1 25
Serving each Special Juror (besides mileage at 13 cents per mile)	0 25
Returning Panel of Special Jurors	0 50
Keeping and Checking Pay List of Special Jurors, attendance in each case.....	1 00
Every Jury sworn or Cause tried before a Judge...	0 80
Poundage on Executions, and on Attachments in the nature of Executions, upon the sum made in the \$ five per cent., exclusive of mileage for going to seize and sell, and except all disbursements necessarily incurred in the care and removal of property	
Schedule of Goods taken in Execution, Attachment or other Process. including copy to defendant, not to exceed five folios	0 50
Each folio above five.....	0 10
Drawing Advertisements when required by Law to be published in the <i>Official Gazette</i> or other news- paper, or to be posted up in a Court House or other places, and transmitting same in each suit.	0 75
Every necessary Notice of Sale of Goods in each suit	0 40
Every Notice of Postponement of Sale in each suit,	0 20
The sum actually disbursed for advertisements re- quired by Law to be inserted in the <i>Official Ga- zette</i> or other newspaper	
Executing Writ of Possession and serving and exe- cuting Writ of Restitution, besides mileage	2 00
Bringing up prisoner on Attachment, besides travel at 20 cents per mile	1 00
Actual and necessary mileage from the Court House to the place where service of any Process paper or proceeding is made, per mile.....	0 13
Seizing Estate and Effects on Attachment against an absconding Debtor	1 50
Removing or Retaining Property, reasonable and necessary disbursements and allowances to be made by order of the Court or a Judge.....	
Presiding or attendance on Execution of Writ of Enquiry, or other Writ of a like nature per day.	4 00
Summoning each Juror in such case	0 50

Bailiff's Fee, Summoning Jury, per mile	\$0 13
Hire of Room, if actually paid, not to exceed \$2 per day	
Mileage from the Court House to the place where Writ executed, per mile	0 13
Drawing Bond to secure Goods taken under an Attachment against an absconding debtor, if prepared by Sheriff	1 50
Every Letter written (including Copy) required by Party or his Attorney respecting Writs or Process when postage pre-paid	0 30
Drawing every Affidavit when necessary and prepared by the Sheriff	0 25
Precept on Warrant to Bailiff on Replevin.....	0 40
Drawing Notice for Service on Defendant in Replevin	0 40
Delivering Goods to the party obtaining the Replevin Writ.....	1 50
For Writ, &c., De Retorno Habendo	0 50
Drawing Replevin Bond	1 00
All necessary disbursements for the possession, care and removal of Property taken in Replevin	

CORONERS.

The same Fees shall be taxed and allowed to Coroners for services rendered by them in the service, execution and return of process, as allowed to Sheriffs for the same services, and above specified.

CRIER.

Calling every case, with or without Jury	0 50
Swearing each witness or constable.....	0 15

ALLOWANCE TO WITNESSES.

To Witnesses residing within three miles of the Court House, per diem	1 00
To Witnesses residing over three miles from the Court House	1 25
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem	4 00

Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem	\$4 00
If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only	
The travelling expenses of Witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile, one way.....	

COMMISSIONER.

For taking every Affidavit	0 20
Taking every Recognizance of Bail.....	0 50

WM. B. RICHARDS, C. J.
 JOHN H. HAGARTY, C. J. C. P.
 JOS. C. MORRISON, J.
 ADAM WILSON, J.
 THOMAS GALT, J.
 JAS. ROBT. GOWAN, Co. J.

On 14th February, 1874, the following Rules were published:—

GENERAL RULES
OF THE
ELECTION COURT
FOR THE
PROVINCE OF ONTARIO.

Made under and by virtue of the Act of the Dominion of Canada, passed 23rd May, A.D. 1873, being "THE CONTROVERTED ELECTIONS ACT, 1873."

I.

The Presentation of an Election Petition shall be made by leaving it at the office of the Clerk of the Election Court, who, or his clerk, shall (if required) give a receipt, which may be in the following form:—

Received on the day at the office
of the Clerk of the Election Court a petition touching the
election of A. B., a member for purporting to be
signed by (*insert the names of Petitioners.*)

C D., Clerk.

With the petition shall also be left a copy thereof for the said Clerk of the Election Court to send to the returning officer, pursuant to section 11 of the Act.

II.

An Election Petition shall contain the following statements:—

1. It shall state the right of the Petitioner to petition within section 10 of the Act.

2. And your Petitioners state that the Election was holden on the day of A.D. when A. B., C. D., and E. F. were candidates, and the Returning Officer has returned A. B. as being duly elected.

3. And your Petitioners say that (*here state the facts and grounds on which the Petitioners rely.*)

Wherefore your Petitioners pray that it may be determined that the said A. B. was not duly elected or returned, and that the Election was void, (*or that the said E. F. was duly elected and ought to have been returned, or as the case may be.*)

(Signed)

A.

B.

VI.

Evidence need not be stated in the Petition, but the Court or one of the Election Judges may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial in the same way as in ordinary proceedings in the Superior Courts of Common Law, and upon such terms as to costs and otherwise as may be ordered.

VII.

When a Petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of and the party defending the Election or return, shall each, six days before the day appointed for trial, deliver to the Clerk of the Election Court and also at the address, if any, given by the Petitioners and Respondent (as the case may be), a list of the votes intended to be objected to and of the heads of objection to each such vote, and the Clerk of the Election Court shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or one of the Election Judges upon such terms as to amendment of the list,

postponement of the enquiry, and payment of costs or otherwise, as may be ordered.

VIII.

When the Respondent in a Petition under the Act, complaining of an undue return and claiming the seat for some person, intends to give evidence to prove that the Election of such person was undue, pursuant to the 54th section of the Act, such Respondent shall, six days before the day appointed for trial, deliver to the Clerk of the Election Court, and also at the address, if any, given by the Petitioner, a list of the objections to the Election upon which he intends to rely. And the Clerk of the Election Court shall allow inspection and office copies of such list to all parties concerned ; and no evidence shall be given by a Respondent of any objection to the Election not specified in the list, except by leave of the Court or one of the Election Judges, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs as may be ordered.

IX.

With the Petition, Petitioners shall leave at the office of the Clerk of the Election Court a writing, signed by them or on their behalf, giving the name of some person entitled to practise as an Attorney or whom they authorize to act as their Agent, or stating that they act for themselves, as the case may be, and in either case giving an address, within the City of Toronto, at which notices addressed to them may be left ; and if no such writing be left or address given, then notice of objection to the recognizances and all other notices and the proceedings may be given by sticking up the same at the office of the Clerk of the Election Court.

X.

Any person returned as a member may, at any time after he is returned, send or leave at the office of the Clerk of

the Election Court, a writing signed by him or on his behalf, appointing a person entitled to practise as an Attorney to act as his Agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the City of Toronto, at which notices may be left, and in default of such writing being left within a week after service of the petition, notices and proceedings may be given and served respectively by sticking up the same at the office of the Clerk of the Election Court.

XI.

The Clerk of the Election Court shall keep a book or books at his office, in which he shall enter all addresses and the names of agents given under either of the preceding rules, which book shall be open to inspection by any person during office hours without payment of any fee.

XII.

The Clerk of the Election Court shall, upon the presentation of the petition, forthwith send a copy of the petition to the returning officer pursuant to section 11 of the Act, and shall therewith send the name of the Petitioner's Agent, if any, and of the address, if any, given as prescribed, and also the name of the Respondent's agent, and the address given as prescribed, and the returning officer shall forthwith publish those particulars along with the petition.

The cost of publication of this and any other matter required to be published by the returning officer, shall be paid by the Petitioner or person moving in the matter, and shall form part of the general costs of the petition.

XIII.

The time for giving notice of the presentation of a petition, and of the nature of the proposed security, shall be five days, exclusive of the day of presentation.

XIV.

Where the Respondent has named an agent or given an address, the service of an election petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such a time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the respondent, unless one of the Election Judges, on an application made to him not later than five days after the petition is presented on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the respondent, in which case the said Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.

In case of evasion of service, the affixing in a conspicuous place in the office of the Clerk of the Election Court a notice of the petition having been presented, stating the petitioner, the prayer and the nature of the proposed security, shall be deemed equivalent to personal service, if so ordered by one of the Election Judges.

XVI.

The deposit of money by way of security for payment of costs, charges and expenses, payable by the Petitioner, shall be made by payment to the Clerk of the Election Court.

XVII.

All claims at law or in equity to money deposited or to be deposited for payment of costs, charges and expenses payable by the petitioners pursuant to the said 16th rule, shall be disposed of by the Election Court or one of the Election Judges.

XVIII.

Money so deposited shall, if and when the same is no longer needed for securing payment of such costs, charges and expenses, be returned or otherwise disposed of as justice may require, by rule of the Election Court or order of one of the Election Judges.

XIX.

Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for, as the Court or one of the Election Judges may require.

XX.

The rule or order may direct payment either to the party who deposited the same, or to any person entitled to receive the same.

XXI.

Upon such a rule or order being made, the amount may be paid by the Clerk of the Election Court.

XXII.

The Clerk of the Election Court shall keep a book open to inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable, which book may be inspected without payment of any fee.

XXIII.

The recognizance as security for costs may be acknowledged before one of the Election Judges, or the Clerk of the Election Court, or a Justice of the Peace in the Country.

There may be one recognizance acknowledged by all the sureties, or separate recognizances by one or more (not exceeding four), as may be convenient.

XXIV.

The recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained, and may be as follows:—

IN THE ELECTION COURT.

Dominion of Canada, } Be it remembered that on the
Province of Ontario. } day of in the
To wit: } year of our Lord, 18 before me
(*name and description*) came A. B. of (*name and description as above prescribed*) and acknowledged himself (*or severally acknowledged themselves*) to owe to our Sovereign Lady the Queen, the sum of one thousand dollars (*or the following sums*) [that is to say] the said C. D. the sum of \$, the said E. F. the sum of \$, the said G. H. the sum of \$, and the said J. K. the sum of \$, to be levied on his (*or their respective*) goods and chattels, lands, and tenements, to the use of our Sovereign Lady the Queen, her heirs and successors.

The condition of this recognizance is that if (*here insert the names of all the petitioners, and if more than one, add, or any of them*), shall well and truly pay all costs, charges and expenses, in respect of the election petition signed by him (*or them*) relating to the Election of a Member for the House of Commons for (*here insert the name of the Electoral Division*) which shall become payable by the said petitioner (*or petitioners or any of them*) under the "Controverted Elections Act, 1873," to any person or persons, then this recognizance to be void, otherwise to stand in full force.

(Signed) (Signatures of Securities.)

Taken and acknowledged by the above-named (*names of sureties*) on the day of at before me

C. D.

A Justice of the Peace (*or as the case may be.*)

XXV.

The recognizance or recognizances shall be left at the office of the Clerk of the Election Court by or on behalf of the petitioner, in like manner as before prescribed for the hearing of a petition, forthwith after being acknowledged.

XXVI.

The time for giving notice of any objection to a recognizance, under the 12th section of the Act, shall be within five days from the date of service of the notice of the petition and of the nature of the security, exclusive of the day of service.

XXVII.

An objection to the recognizance must state the ground or grounds thereof, as that the sureties, or any, and which of them, are insufficient, or that a surety is dead, or that he cannot be found, or that a person named in the recognizance has not duly acknowledged the same.

XXVIII.

An objection made to the security shall be heard and decided by the Clerk of the Election Court, subject to appeal within five days to one of the Election Judges, upon summons taken out by either party, to declare the security sufficient or insufficient.

XXIX.

Such hearing and decision may be either upon affidavit or personal examination of witnesses, or both, as the Clerk of the Election Court or Judge may think fit.

XXX.

If by order made upon such summons the security be declared sufficient, its sufficiency shall be deemed to be established within the meaning of the 13th section of the said Act, and the petition shall be at issue.

XXXI.

If by order made on such summons an objection be allowed, and the security be declared insufficient, the Clerk of the Election Court or one of the Election Judges shall, in such order, state what amount he deems requisite to make the security sufficient, and the further prescribed time to remove the objection by deposit shall be within five days from the date of the order, not including the day of the date, and such deposit shall be made in the manner already prescribed.

XXXII.

The costs of hearing and deciding the objections made to the security given shall be paid as ordered by the Clerk of the Election Court or one of the Election Judges, and, in default of such order, shall form part of the general costs of the petition.

XXXIII.

The costs of hearing and deciding an objection upon the grounds of insufficiency of a surety or sureties, shall be paid by the petitioner, and a clause to that effect shall be inserted in the order declaring its sufficiency or insufficiency unless at the time of leaving the recognizance with the Clerk of the Election Court there be also left with him an affidavit of the sufficiency of the surety or sureties, sworn by each surety before a justice of the peace, which affidavit any justice of the peace is hereby authorized to take, or before some person authorized to take affidavits in some one of the Superior Courts, that he is seized or possessed of real or personal estate, or both, above what will satisfy his debts, of the clear value of the sum for which he is bound by his recognizance, which affidavit may be as follows:—

In the Election Court.

“THE CONTROVERTED ELECTIONS ACT, 1873.”

I, A. B., of (*as in recognizance*) make oath and say, that I am seized or possessed of real (*or* personal, *or* real and personal) estate, above what will satisfy my debts, of the clear value of \$

Sworn, &c.

XXXIV.

The order of the Clerk of the Election Court for payment of costs shall have the same force as an order made by one of the Election Judges, and may be made a rule of the Election Court, and enforced in like manner as a Judge's order.

XXXV.

The Clerk of the Election Court shall make out the Election list. In it he shall insert the names of the Agents of the petitioners and respondent and the addresses to which notices may be sent, if any. The list may be inspected at the office of the Clerk of the Election Court at any time during office hours, and shall be put up for that purpose upon a notice board appropriated to proceedings under the said Act, and headed "Controverted Elections Act, 1873."

XXXVI.

The time and place of the trial of each election petition shall be fixed by the Judges of the Election Court, and notice thereof shall be given in writing by the Clerk of the Election Court by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the petitioner, another to the address given by the respondent, if any, and a copy by the post to the Sheriff, fifteen days before the day appointed for the trial. The Sheriff shall forthwith publish the same in the Electoral Division.

XXXVII.

The affixing of the notice of trial at the office of the Clerk of the Election Court shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXXVIII.

The notice of trial may be in the following form :—

IN THE ELECTION COURT.

“THE CONTROVERTED ELECTIONS ACT, 1873.”

Election Petition of (*name the Electoral Division*), Take notice that the above Petition (*or* Petitions), will be tried at on the day of , and on such other subsequent days as may be needful.

Dated the day of

By order,

(Signed) A.B.

Clerk of the Election Court.

XXXIX.

Notice of the time and place of the trial of each Election Petition shall be transmitted by the Clerk of the Election Court to the Clerk of the Crown in Chancery for the Dominion of Canada, and the Clerk of the Crown in Chancery shall, on or before the day fixed for the trial, deliver or cause to be delivered to the Registrar of the Judge who is to try the Petition, or his Deputy, the Poll Books, for which the Registrar or his Deputy shall give, if required, a receipt; and that the Registrar or his Deputy shall keep in safe custody the said Poll Books until the trial is over, and then return the same to the said Clerk of the Crown in Chancery.

XL.

Any one of the Election Judges may from time to time, by order made upon the application of a party to the Petition, or by notice in such form as the Judge may direct to be sent to the Sheriff, postpone the commencement of the trial to such day as he may name, and such notice when received shall be forthwith made public by the Sheriff.

XLI.

In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day until the arrival of the Judge.

XLII.

No formal adjournment of the Court for the trial of an Election Petition shall be necessary, but the trial is to be deemed adjourned, and may be continued from day to day until the enquiry is concluded; and in the event of the Judge who begins the trial being disabled by illness or otherwise, it may be recommenced and concluded by any other of the Election Judges.

XLIII.

The application to state a special case may be made by rule in the Election Court when sitting, or by a summons before one of the Election Judges upon hearing the parties.

XLIV.

All affidavits and papers in any matter in the Election Court, or in any Court for the trial of an Election Petition, may be entitled as follows:—

IN THE ELECTION COURT.

THE CONTROVERTED ELECTIONS ACT, 1873.

Election of a Member for the House of Commons for
(*name the Electoral Division.*)

Dominion of Canada. }
Province of Ontario. }
To wit: }

XLV.

An officer shall be appointed for each Court for the trial of an Election Petition, who shall attend at the trial in like manner as the Clerks of Assize and of Arraignment attend at the Assizes.

Such officer may be called the Registrar of that Court. He by himself, or in case of need his sufficient Deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XLVI.

The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.

XLVII.

The order of a Judge to compel the attendance of a person as a witness may be in the following form:—

Court for the trial of an Election Petition for (*complete the title of the Court*), the day of

To A. B. (*describe the person*), you are hereby required to attend before the above Court at (*place*) on the day of , at the hour of (*or forthwith as the case may be*), to be examined as a witness in the matter of the said Petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.

Judge of the said Court.

XLVIII.

In order to the commitment of any person for contempt, the warrant may be as follows:—

At a Court holden on at for the trial of an Election Petition for the (*here name the Electoral Division*), before the Honorable and one

of the Election Judges, pursuant to the "Controverted Elections Act, 1873."

Whereas, A. B. has this day been guilty, and is by the said Court adjudged to be guilty of a contempt thereof, The said Court does, therefore, sentence the said A. B. for his said contempt to be imprisoned in the Gaol for _____, and to pay to our Lady the Queen a fine of \$ _____, and to be further imprisoned in the said Gaol until the said fine be paid. And the Court further orders that the Sheriff of the said County (*or as the case may be*) and all constables and officers of the Peace of any County or place where the said A. B. may be found, shall take the said A. B. into custody, and convey him to the said Gaol, and there deliver him into custody of the Gaolor thereof to undergo his said sentence. And the Court further orders the said Gaolor to receive the said A. B. into his custody, and that he shall be detained in the said Gaol in pursuance of the said sentence.

Signed the _____ day of _____ A. D.

(*To be signed by the Judge*).

XLIX.

Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts, as the case may be, and to all constables and officers of the Peace of the County or place where the person adjudged guilty of contempt may be found, and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed, or any or either of them.

L.

All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before any one of the Election Judges, who shall have the same control over the proceedings under the "Controverted Elections Act, 1873," as a Judge at Chambers in

the ordinary proceedings of the Superior Courts, and such questions and matters may be heard and disposed of by any one of the Election Judges.

LI.

Notice of an application for leave to withdraw a Petition shall be in writing and signed by the Petitioners or their agent. It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient :—

IN THE ELECTION COURT.

“The Controverted Elections Act, 1873,” (*name the Electoral Division*).

Petition of (*state petitioners*) presented day of

The Petitioner proposes to apply to withdraw his Petition upon the following ground (*here state the ground*), and prays that a day may be appointed for hearing his application.

Dated this day of
(Signed)

LII.

The notice of application for leave to withdraw shall be left at the office of the Clerk of the Election Court.

LIII.

A copy of such notice of the intention of the Petitioners to apply for leave to withdraw his Petition shall be given by the Petitioner to the Respondent, and to the Returning Officer, who shall make it public in the Electoral Division to which it relates, and shall be forthwith published by the Petitioner in at least one newspaper published or circulating in the place, if any.

The following may be the form of such notice :—

IN THE ELECTION COURT.

“The Controverted Elections Act, 1873.” In the Election Petition for in which is Petitioner and

Respondent, Notice is hereby given that the above Petitioner has on the day of lodged at the office of the Clerk of the Election Court notice of an application to withdraw the Petition, of which notice the following is a copy (*set it out*). And take notice that, by the rule made by the Judges, any person who might have been a petitioner in respect of the said Election may, within five days after publication by the Returning Officer of this notice, give notice in writing of his intention on the hearing to apply for leave to be substituted as a Petitioner.

(Signed)

LIV.

Any person who might have been a Petitioner in respect of the Election to which the Petition relates, may within five days after such notice is published by the Returning Officer, give notice in writing, signed by him or on his behalf, to the Clerk of the Election Court, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

LV.

The time and place for hearing the application shall be fixed by one of the Election Judges, and whether before the Election Court or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the Clerk of the Election Court as hereinbefore provided, and notice of the time and place appointed for the hearing shall be given to such person or persons, if any, as shall have given notice to the Clerk of the Election Court of an intention to apply to be substituted as petitioners, and otherwise in such manner and at such time as the Judge directs.

LVI.

Notice of abatement of a petition, by death of the petitioner or surviving petitioner, under section 44 of the said Act, shall be given by the party or person interested in the same manner as notice of an application to withdraw a petition; and the time within which application may be made to the Court or one of the Election Judges, by motion or summons of a Judge, to be substituted as a Petitioner, shall be one calendar month, or such further time as, upon consideration of any special circumstances, the Court or Judge may allow.

LVII.

If the respondent dies, or is summoned to Parliament as a member of the Senate, or if the House of Commons have resolved that his seat is vacant, any person entitled to be a petitioner under the Act, in respect of the election to which the petition relates, may give notice of the fact in the Electoral Division by causing such notice to be published in at least one newspaper published or circulating therein, if any, and by leaving a copy of such notice signed by him or on his behalf with the returning officer, and a like copy with the Clerk of the Election Court.

LVIII.

The manner and time of the respondent giving notice to the Court that he does not intend to oppose the petition, shall be by leaving notice thereof, in writing, at the office of the Clerk of the Election Court, signed by the respondent six days before the day appointed for trial, exclusive of the day of leaving such notice.

LIX.

Upon such notice being left at the office of the Clerk of the Election Court, he shall forthwith send a copy thereof by the post to the petitioner or his agent, and to the Sheriff, who shall cause the same to be published in the Electoral Division.

LX.

The time for applying to be admitted as a respondent in either of the events mentioned in the 41st section of the Act, shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or one of the Election Judges may allow.

LXI.

Costs shall be taxed by the Clerk of the Election Court, or, at his request, by any Master of a Superior Court, upon the rule of Court or Judge's order by which the costs are payable, and costs when taxed may be recovered by execution issued upon the rule of Court ordering them to be paid; or, if payable by order of a Judge, then by making such order a rule of Court in the ordinary way, and issuing execution upon such rule against the person by whom the costs are ordered to be paid, or in case there be money in Court available for the purpose, then to the extent of such money by order of the Election Court or of one of the Election Judges.

The office fees payable for inspection, office copies, enrolment, and other proceedings under the Act, and these rules, shall be the same as those payable, if any, for like proceedings according to the present practice of the Court of Queen's Bench. The fees shall be payable in money, and shall be accounted for by the Clerk of the Election Court to the Receiver-General of the Dominion of Canada.

LXII.

An Agent employed for the Petitioner or Respondent shall forthwith leave written notice at the office of the Clerk of the Election Court of his appointment to act as such Agent, and service of notices and proceedings upon such Agent shall be sufficient for all purposes.

LXIII.

At the time appointed for the trial of any Election Petition, the petitioner shall leave with the Registrar, for

the use of the Judge at the trial, fairly written on one side of the paper only, a copy of the Petition and of all the proceedings thereon, which show the several matters to be tried—including the particulars of objections on either side; the correctness of which copy, in so far as the proceedings are filed with the Clerk of the Election Court, shall be certified by the said Clerk. The Judge may allow amendment of the said copy, or in default of such copy being delivered, the Judge may refuse to try the petition or may allow a further time for delivery of the copy, or may adjourn the trial—in every case upon such terms, as to costs and otherwise, as the Judge shall see fit to impose.

LXIV.

Writs of *Subpcena ad testificandum* and *duces tecum* under the seal of the Election Court, for the attendance of witnesses before the Election Court or before the Court for the trial of any Election Petition, may be issued at any time by the Clerk of the Election Court, which writs may be in the following form :—

IN THE ELECTION COURT.

SUBPŒNA.

Dominion of Canada. } VICTORIA, by the grace of GOD, of
Province of Ontario. } the United Kingdom of Great
To wit: } Britain and Ireland, QUEEN,
Defender of the Faith.

To_____

We command you that, all excuses being laid aside, you and every of you be and appear in your proper persons before our Election Judge, assigned to try the Election Petition for (*name the Electoral Division*) at _____ in the County of _____ on the _____ day of _____ 187 - , by _____ o'clock in the _____ noon of the same day, and so from day to day until the said Election Petition shall be tried, or otherwise

disposed of, to testify all and singular you or either of you know in the matter of the said Election Petition, depending in our Election Court at Toronto, wherein is (or are) Petitioner, and is (or are) Respondent, on the part of the and at the Court for the trial of the said Election Petition for (*name the Electoral Division*) at aforesaid, to be tried by our said Election Judge without a jury; and also that you bring with you and produce at the time and place aforesaid (*describing what is to be produced in the ordinary way*)

(or before our said Election Court for the Province of Ontario, at Toronto, on the day of 187 , by o'clock in the noon of the same day, to testify all and singular those things which you or either of you know in the matter of an Election Petition depending in our said Court at Toronto (*describing the Petition as above, or other the matter in which the witness is called, as the case may be*), and also that you bring with you and produce at the time and place aforesaid—*describing what is to be produced as aforesaid*, and this you or any of you shall by no means omit, under the penalty upon each of you of one hundred pounds.

Witness the Hon. (*the senior Election Judge*) one of the Judges of our *Election Court*, at Toronto, the day of 187

(Signed) A. B.,

Clerk of the Election Court.

LXV.

After the trial of any Election Petition, the Judge shall return to the Clerk of the Election Court the evidence and proceedings before the said Judge and his finding on the said Petition.

LXVI.

No proceeding under "The Controverted Elections Act, 1873," shall be defeated by any formal objection.

LXVII.

Any rule made or to be made in pursuance of the Act, shall be published by a copy thereof being put up in the office of the Clerk of the Election Court.

Dated the 29th day of January, A.D. 1874.

(Signed)	WM. B. RICHARDS, C.J.
"	J. G. SPRAGGE, C.
"	JOHN H. HAGARTY, C.J.C.P.
"	JOS. C. MORRISON, J.
"	ADAM WILSON, J.
"	THOMAS GALT, J.
"	S. H. STRONG, V.C.
"	S. H. BLAKE, V.C.

On the 25th of February, 1874, the following Rule was published :—

The following Rule, in addition to the General Rules of the Election Court for the Province of Ontario, is made under and by virtue of the Act of the Dominion of Canada, passed 23rd May, A.D. 1873, being the Controverted Elections Act, 1873.

“ All affidavits and affirmations required to be used in the said Election Court, or in any proceedings under the Controverted Elections Act, 1873, may be taken and made before any Commissioner appointed for taking affidavits by either of the Superior Courts of Law or Equity in the Province of Ontario; and every Commissioner for taking affidavits in either of the Superior Courts of Common Law, or in the Court of Chancery in the said Province of Ontario, shall be deemed an officer of the said Election Court.

“ Dated this 23rd day of February, A.D. 1874.

(Signed)	WM. B. RICHARDS, C. J.
“	J. G. SPRAGGE, C.
“	JOHN H. HAGARTY, C. J. C. P.
“	JOS. C. MORRISON, J.
“	THOMAS GALT, J.
“	S. H. STRONG, V. C.
“	S. H. BLAKE, V. C.”

On the 2nd of February, 1874, the following Tariff was read in Court.

SUPERIOR COURT.

SHERIFF'S TARIFF—CIVIL SIDE.

From and after the first day of March next, the following fees and allowances shall be taken and received in Civil Suits, in the Superior Courts of Common Law, in lieu of fees for similar services and allowances under the Tariffs now in force in the said Courts :—

Every Warrant to execute any Process mesne or final, directed to the Sheriff, when given to a Bailiff.....	\$0 75
Arrest when amount does not exceed \$200	2 00
“ “ “ \$400	4 00
“ “ over \$400	6 00
Bail Bond or Bond to the limits.....	2 00
Assignment of the same.....	1 00
Service of Process, non-bailable, Scire Facias or Writ of Revivor, each defendant (no fee for Affidavit of service in such cases to be allowed unless service made or recog- nized by Sheriff).....	1 50
For each Summoner on Writ of Scire Facias per day, to be paid by the Sheriff	1 00
Serving Declarations, Subpœnas, Rules, Notices or other papers (besides mileage).....	0 75
—for each <i>additional</i> party served, 50c	
Receiving, filing, entering and endorsing all Writs, Declara- tions, Rules, Notices or other papers, each.....	0 25
Return of all Process and writs except Subpœna.....	0 50
Return of Declarations, Rules, Notices or other papers,...	0 25
Every search, not being by a party to a cause or his Attorney	0 30

Certificate of result of such search, when required (a search for a writ against lands of a party shall include sales under a writ against same party, and for the then last six months).....	\$0 75
Notice of appointment for ballot of Jury.....	0 50
Notice to Clerk of Peace of such appointment.....	0 50
Fee on balloting Special Jury.....	5 00
Fee on striking ".....	2 50
Serving each special Juror (besides mileage at 13c. per mile)	0 50
Returning Panel of Special Jurors.....	1 00
Keeping and checking pay list of Special Jurors' attendance, in each case.....	1 00
Every Jury sworn or Cause tried before a Judge.....	1 00
Poundage on Executions and on Attachments in the nature of Executions, where the sum made shall not exceed \$1000, six per cent.....	
Where the sum is over \$1000 and under \$4000, three per cent., when the sum is \$4000 and over, one and a half per cent., in addition to the poundage allowed up to \$1000, exclusive of mileage, for going to seize and sell, and except all disbursements necessarily incurred in the care and removal of property.....	
Schedule taken on Execution, attachment or other process, including copy to defendant not exceeding 5 folios.....	1 00
Each folio above 5.....	0 10
Drawing advertisements when required by law to be published in the official Gazette or other newspaper, or to be posted up in a Court House or other place, and transmitting same in each suit.....	1 50
Every necessary notice of Sale of Goods, in each suit.....	0 75
Every notice of Postponement of Sale in each suit.....	0 25
The sum actually disbursed for Advertisements required by law to be inserted in the official Gazette or other newspaper.....	
Executing writ of Possession and serving and executing Writ of Restitution, besides mileage.....	6 00
Bringing up Prisoner on attachment or Habeas Corpus, besides travel at 20c per mile.....	
Seizing Estate and Effects on attachment against an absconding debtor.....	3 00

Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Master or by order of the Court or a Judge.....	\$
Presiding or attendance on execution of Writ of Enquiry or under any Writ of Escheat, or other Writ of a like nature	5 00
Summoning each Juror in such case.....	0 25
Bailiff's fee summoning Jury, mileage per mile.....	0 13
Hire of Room, if actually paid, not to exceed \$2 per day..	
Mileage from the Court House to the place where Writ executed, per mile.....	0 13
Drawing bond to secure goods taken under an attachment against an absconding debtor, if prepared by Sheriff..	
Every Letter written (including copy) required by party or his attorney respecting Writs or Process, when postage prepaid	0 50
Drawing every Affidavit when necessary and prepared by Sheriff	0 25
Precept or warrant to Bailiff in Replevin.....	0 75
Drawing Notice for service on Defendant in Replevin....	0 75
Delivering Goods to the party obtaining the writ of Replevin	3 00
For Writ De Retorno Habendo	1 00
Drawing Replevin Bond.....	2 00
All necessary disbursements for the possession, care and removal of property taken in Replevin.....	
Viewing lands and instructing Surveyors under Hab. Fac. Seisin, exclusive of mileage, per day.....	5 00
Giving Possession, exclusive of mileage and assistance.....	5 00
All necessary disbursements to Surveyors and others for surveying the lands and giving possession to be allowed to the Sheriff.....	

CORONERS.

The same Fees shall be taxed and allowed to Coroners for services rendered by them in the service, execution and return of process, as allowed to Sheriffs for the same services, and above specified.

CRIER.

Calling every case, with or without Jury.....	0 60
Swearing each witness or constable.....	0 15

ALLOWANCE TO WITNESSES.

To Witnesses residing within three miles of the Court House, per diem.....	\$1 00
To Witnesses residing over three miles from the Court House.....	1 25
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem.....	4 00
Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem.....	4 00
If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.....	
The Travelling Expenses of Witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile, one way.....	

COMMISSIONER.

For taking every Affidavit.....	0 20
Taking every Recognizance of Bail.....	0 50

(Signed)	WM. B. RICHARDS, C. J.
"	JOHN H. HAGARTY, C. J. C. P.
"	JOS. C. MORRISON, J.
"	ADAM WILSON, J.
"	THOMAS GALT, J.

DATED 2nd February, 1874.

IN THE COURT OF ERROR AND APPEAL.

JOSEPH FLEURY, (Plaintiff in the Court below), *Respondent*;
v. NOBLE MOORE AND MAITLAND MCCARTHY, (Defendants in the Court below), *Appellants*.

Bond—Construction of.

One M. and his sureties gave a bond to F., the plaintiff, reciting that F. had "appointed the above bounden M. his agent, to sell certain articles and things which the said F. is to manufacture and send to the said M. for that purpose, at and for the prices the said F. may put upon such articles and things in his instructions to said M., and has also appointed the said M. his agent to collect and receive all moneys arising out of such sales to the use of said F."

The condition then was "that if the above bounden M. shall in all things well and faithfully carry out the said agency on his part, and shall well and truly make correct and faithful returns to the said F. of all moneys arising out of the sale of any of the articles or things aforesaid, *and of all other moneys the said M. may at any time during the continuance of the said agency collect for the said F., at the time and in the manner mentioned in the instructions of the said F., and agreed to by the said M. then,*" &c.

Held, that the words in italics did not refer only to such moneys as were to be derived from the proceeds of sales effected by M., and that upon default for other moneys than those arising from such sales collected by him the sureties were liable to F.

APPEAL from the Court of Queen's Bench, in a cause therein, in which the said Joseph Fleury was plaintiff, and one Francis McAuley, and the said Maitland McCarthy and Noble Moore were defendants.

The declaration was on a bond set out below, and alleged the condition of the bond to be that if the defendant Francis McAuley should in all things well and faithfully carry out the said agency on his part, and should well and truly make correct and faithful returns to the plaintiff of all moneys arising out of the sale of any of the said articles or things aforesaid, and of all other moneys the defendant Francis McAuley might at any time during the continuance of the said agency collect for the plaintiff at the times and in the manner mentioned in the said

instructions of the plaintiff, and agreed to by the defendant Francis McAuley, then that the said bond should be void. And the breach was, that—although after the making of the said bond, plaintiff duly sent to the defendant Francis McAuley, as his agent, large quantities of articles and things of great value, to wit, of \$4,000, which the plaintiff had manufactured or caused to be manufactured in the terms of the said bond, with instructions to the defendant F. McA. to sell the same for the prices put upon such articles and things by the plaintiff, and which the said defendant F. McA. sold, or received and did not return to the plaintiff—Yet the defendant F. McA. did not in all things well and faithfully carry out the said agency on his part, and did not well and truly make correct and faithful returns to the said plaintiff of all moneys arising out of the sales of the said articles and things aforesaid, and of all other moneys the defendant F. McA. at any time during the continuance of the said agency collected for the said plaintiff, at the times and in the manner mentioned as aforesaid, whereby the said bond became forfeited.

Pleas, 1—Non est factum.

2. That the defendant F. McA. did in all things well and faithfully carry out the said agency on his part, and did well and truly make correct and faithful returns to the said plaintiff, of all moneys arising out of the sales of the said articles and things aforesaid, and all other moneys the defendant F. McA. at any time during the continuance of the said agency collected for the said plaintiff, at the times and in the manner mentioned as aforesaid.

Issue.

The cause was tried at the Spring Assizes of 1871, for the County of York, before Gwynne, J.

The plaintiff put in and proved a bond by the defendants to the plaintiff, in \$4,000, dated 14th May, 1868, reciting and conditioned as follows:—"Whereas the said Joseph Fleury has appointed the above bounden Francis McAuley his agent to sell certain articles and things which the said Fleury is to manufacture and send, or cause to be manu-

factured and sent, to the said McAuley for that purpose, at and for the prices the said Fleury may put upon such articles and things in his instructions to the said McAuley, and has also appointed the said McAuley his agent to collect and receive all moneys arising out of such sales to the use of the said Fleury : And whereas the said McAuley has agreed to make due returns to the said Fleury of all moneys so collected : Now the condition of this obligation is such that if the above bounden Francis McAuley shall in all things well and faithfully carry out the said agency on his part, and shall well and truly make correct and faithful returns to the said Joseph Fleury of all moneys arising out of the sale of any of the articles or things aforesaid, *and of all other moneys the said McAuley may at any time during the continuance of the said agency collect for the said Fleury*, at the times and in the manner mentioned in the said instructions of the said Fleury and agreed to by the said McAuley, then his obligation to be void, otherwise to be and remain in full force, virtue and effect.

	(Signed)	" FRANCIS MCAULEY.	[L.S.]
" Signed, sealed and delivered in presence of }		" M. MCCARTHY.	[L.S.]
		" NOBLE MOORE.	[L.S.]
(Signed) H. E. NELLIS."			

(The words in italics are interlined in the original bond.)

The plaintiff then gave evidence to shew the default made by McAuley in his agency, and was proceeding to offer evidence as to the moneys collected by said McAuley for him, other than moneys arising from the sale of goods made by the said McAuley for the plaintiff, when the counsel for the defendant objected that the defendants were not liable on the said bond for any moneys collected and not accounted for by McAuley, except for goods of the plaintiff sold by the said McAuley.

His Lordship received the evidence subject to the objection, and it appearing that the cause involved the consideration of complicated accounts, it was agreed, on the suggestion of the learned judge, that a verdict should be entered for the plaintiff for \$4,000 debt, the full penalty of the bond,

and 20cts. damages, and damages were assessed on the breaches at \$1,300 ; and that the point of law arising upon the construction of the bond be submitted to the Court, and that upon that construction being given, the taking of the accounts as to such parts as the Court should deem the defendants liable for in this action, according to the construction they should put upon the condition of the bond, should be referred to the Master or other person to be appointed by the Court ; the clerk of this honourable Court, to whom the taking of the account was to be referred, to have power to reduce the damages assessed on breaches, or to enter a verdict for defendants on the second plea, as the case might be ; and a verdict was taken accordingly.

In Easter Term following *McCarthy*, Q.C., for the defendants, obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict entered for him should not be set aside, and a verdict entered for defendants, or why the damages assessed on the breaches should not be reduced to such an amount as might be really due herein.

During the following term *K. Mackenzie*, Q. C., for the plaintiff, shewed cause to the rule, which was supported by *McCarthy*, Q. C., when it was ordered that the rule *nisi* aforesaid, in so far as it seeks to have a verdict entered for the defendants, be discharged, and that the verdict for the plaintiff do stand for such an amount as the Court shall determine upon a report of the clerk of the Crown and Pleas of the Court of Queen's Bench upon the matters of account ; and the Court deferred judgment on that branch of the rule which asked that the damages assessed on the breaches should be reduced.

In Michaelmas Term following, *R. G. Dalton*, Esq., Q. C., the clerk of the Crown and Pleas, to whom the making of the enquiry and taking of the accounts had been referred as aforesaid, presented his report, by which he found as follows :—

1. I find that since the making of the bond in the declaration mentioned, and before the commencement of this suit, goods had been furnished by the plaintiff to the

defendant McAuley, under and in pursuance of the contract in the bond contained, for sale by the said McAuley for the plaintiff, to the amount of \$2,500 and more. But that all the said goods have been duly accounted for by the said McAuley or the other defendants, except goods to the amount of \$426.69, which amount still is due by McAuley to the plaintiff on the goods account for goods furnished him by the plaintiff under the bond. As to this balance the defendants, the sureties of McAuley, claim to reduce it by the two sums next undermentioned.

2. The terms upon which the goods were furnished to McAuley were, that McAuley was to sell the goods for the plaintiff on commission, and account for them, if sold, either by paying the cash for them, or by handing to the plaintiff promissory notes, given by the respective purchasers of the goods, or if the goods remained unsold, by returning the goods; and on all sales of the goods McAuley was entitled to a commission of six per cent. upon the amount of sales.

3. McAuley, having become embarrassed, left the country in the end of the year, 1869. Before leaving he had sold portions of these goods to one Donner to the amount of \$175.75, upon the agreement with Donner that the plaintiff should accept from Donner old iron in payment of the price of goods at the rate of one cent per pound. The fact of the dealing with Donner by McAuley on these terms was known and assented to by the plaintiff, but not the amount furnished to Donner, nor any of the particulars of the account against him. McAuley never at any time made any returns to the plaintiff of the sales to Donner, nor ever furnished the plaintiff with any note for the amount, or other writing from Donner, nor evidence of the transaction with him, nor ever took any such from Donner. Upon leaving the country, he sent to one of the sureties a book containing entries in his own hand writing of this account, and of the undermentioned account. After McAuley left the country one of the sureties informed the plaintiff of the account against Donner, but the plaintiff refused to recognise it, or

to take the iron. McAuley has since returned to this country, and was examined before me in this matter as a witness.

4. McAuley before he left the country, sold on credit other portions of the said goods, amounting to the value of \$128, in small quantities, to fifty different parties. For these sales he took no notes, and he made no return of them to the plaintiff, and the plaintiff was not aware of the sales until after McAuley had left the country, when he was informed by one of the sureties that there were such sales, but he declined to interfere or credit the moneys, or to take means to collect the monyes, alleging that he thought that was the business of the sureties. The surety, when he informed the plaintiff of these last mentioned sales, gave a list of them to the plaintiff which he had taken from the above-mentioned book, but he did not give the plaintiff the book. The plaintiff resists the allowance of these two sums of \$175.75 and \$128 to the defendants in reduction of the plaintiff's claim.

5. I find that after the making of the said Bond, and during the continuance of the agency of McAuley for the plaintiff therein mentioned, the plaintiff sent to McAuley promissory notes of various parties to a large amount to be collected by McAuley for the plaintiff, upon the terms that the money received should be paid to the plaintiff when collected, less a discount of six per cent. upon the amount collected, and that McAuley received the notes for collection on these terms. I find that upon the said notes the said McAuley received in money \$568.39, which he has not accounted for or paid over to the plaintiff, and that the said sum of \$568.39 last mentioned, was so received by the said McAuley during the continuance of the agency of said McAuley for the plaintiff mentioned in the bond sued on in the said action.

6. The said balance of \$568.39 is made up of moneys received on notes, which had not been taken for goods sold by McAuley on the arrangement in the first and second paragraph mentioned, except as to the sum of \$35.18,

which was received on notes taken for goods sold by McAuley under that arrangement. These notes for \$35.18, had been delivered to the plaintiff by McAuley, and had been sent back to McAuley by the plaintiff for collection.

7. Against this sum of \$568.39 the defendant's sureties now claim to set off or deduct \$95, being commission which had accrued to McAuley on the collection of a portion of the promissory notes in the fifth paragraph mentioned. I find that in fact such commission was due to McAuley, and that the plaintiff has credited the amount upon another debt due from McAuley to the plaintiff, having no connection with the matters of this suit. The plaintiff resists the allowance to the defendants of this said sum of \$95.

I further find (subject to such deductions as the Court shall order, if any) that the said balances of \$426.69 and \$568.39 were due to the plaintiff at and previous to the 1st day of January, A.D. 1870.

On this finding of facts, *K. Mackenzie*, Q. C., for the plaintiff in Michaelmas Term, 1872, obtained a rule calling on the defendants to shew cause why the plaintiff should not have leave to enter final judgment in this cause against the defendants, pursuant to the rule made in Michaelmas Term, 1871, and the said report, for such an amount as the Court should determine on the breach assigned, with interest, during the same term, *McCarthy*, Q. C., shewed cause; *Mackenzie*, Q. C., supported the rule; and judgment was reserved.

On the 23rd of December, 1872, the judgment of the Court, which was oral, was delivered by Mr. Justice Wilson, and thereupon the rule obtained by *McCarthy* in Easter Term, was made absolute to the extent of reducing the damages assessed on the breaches to the sum of \$724.27, and the rule was taken out by *McCarthy* to enter judgment for the same.

The plaintiff on the same day obtained a rule whereby it was ordered that judgment be entered for the plaintiff for the same sum, and with interest thereon from the

verdict, the costs of the proceedings before the Master under the said rule and of his report, to be apportioned according to his finding.

From this judgment the defendants Maitland McCarthy and Noble Moore appealed to this Court, claiming that the damages assessed on the breaches should have been reduced by the further sum of \$438.21.

The following are the said defendants' reasons of appeal :

1. The bond sued on was given for the purpose, as appears by the recital therein contained, of guaranteeing to the plaintiff, that the defendant McAuley would well and faithfully carry out and fulfil the duties of the agency to which he was appointed by the plaintiff, viz. : an agency for the purposes of selling certain articles and things which the plaintiff was to manufacture and send to the said McAuley for sale, and for the purpose of collecting and realizing all moneys arising out of such sales to the use of the plaintiff, and consequently the said defendants are not liable or answerable for any default or misappropriation or wrongful act of the said McAuley other than those arising out of the sale of such goods as were sent to him in pursuance thereof, or in collecting or not accounting for moneys, the proceeds thereof, whereas the Court, in not reducing the damages to the sum of \$286, has held the defendants responsible for the moneys collected and not accounted for by the defendant McAuley, which moneys were not the proceeds of the sales of goods made by said defendant, but of promissory notes sent by the plaintiff to the defendant McAuley to collect, as appears in and by the fifth and sixth paragraphs of the Master's Report.

2. That the general words in the condition of the said bond, " And of all other moneys the said McAuley may at any time during the continuance of the said agency collect for the said Fleury," if sufficiently wide to admit of the construction that would embrace all moneys which the said McAuley might collect for the plaintiff, are qualified and limited by the words thereafter following, that is to

say by the words, "At the times and in the manner mentioned in the said instructions of the said Fleury," which instructions are those referred to in the recital of the said bond, and which, therefore, apply to the agency for sale and the collection of the proceeds of such sales alone.

3. And because it is a rule of construction of a bond, such as the one declared on, that the general terms in the condition are limited by the previous recital to the matters which by the recital it appears the bond was intended to provide for.

June 24th, 1873, (a). *Dalton McCarthy*, Q. C., for appellants. The condition of the bond should be construed as set out in the reasons of appeal: *Hassel v. Long*, 2 M. & S. 362. The Court should not extend the obligation of the bond. The instructions referred to are not general instructions, and only apply to the collection of the proceeds of the sales. If the words interlined are not limited by the recital, they are controlled by it: *Nicholson v. Paget*, 1 C. & M. 48.

Pitman on Principal and Surety, 37, says, "It is established that if the instrument of suretyship is a bond, the condition of the bond shall be construed with reference to the recital which is the proper key to its meaning." See also, *Lord Arlington v. Merricke*, 2 Wms. Saund, last edition, 813 notes; *Corporation of London Assurance of houses, &c., from fire v. Bold*, 6 Q. B. 514; *Pearsall v. Summerset*, 4 Taunt. 593; *Peppin v. Cooper*, 2 B. & Al. 431; *Mayor, Aldermen, &c., of Cambridge v. Dennis*, 27 L. J. Q. B. 474; *Napier v. Bruce*, 8 Cl. & Fin. 470; *Kirby v. Duke of Marlborough*, 2 M. & Sel. 18; *Stibbs v. Clough*, 1 Str. 227; *Company of Proprietors of the Liverpool Waterworks v. Atkinson*, 6 East 507; *Parker v. Wise*, 6 M. & S. 239, 251. *Canada Permanent Building and Savings Society v. Lewis*, 8 C. P. 352, will be cited by the

(a) Argued in appeal, 24th June, 1873. Present, DRAPER, C. J., of Appeal, RICHARDS, C. J., SPRAGGE, C., MORRISON, J., WILSON, J., GALT, J., STRONG, V. C., BLAKE, V. C.

respondent, but there the terms were general, and did not introduce new matter, and the case is distinguishable; but see *Sanson v. Bell*, 2 Camp. N. P. 39.

Mackenzie, Q. C., for respondents. The case of *Canada Permanent Building and Savings Society v. Lewis*, 8 C. P. 352, is like this. Here there is an extended liability by the general words, and they were put there to cover the debts in question: *Charleton v. Spencer*, 3 Q. B. 693; *Napier v. Bruce*, 8 Cl. & Fin. 470; *Oswald v. Mayor, Aldermen. &c., of Berwick-on-Tweed*, 5 H. L. 856; *Mayor, Aldermen, &c., of Clifton Dartmouth Hardness v. Silley*, 7 E. & B. 97.

January 12th, 1874 (a). BLAKE, V. C., delivered the judgment of the Court.

The condition of the bond in question is as follows.

[The learned Vice Chancellor here read the condition, as set out *ante* p. 20.]

Three things seem to be distinctly provided for by this clause: First, Francis McAuley is bound, in general terms, to carry out the agency he has undertaken; second, he is bound to make correct returns of the moneys arising from the sale of the articles, the subject of the agency; and, third, he is to account for "all other moneys" he may "at any time during the continuance of the said agency collect" for Fleury, at the times and in the manner mentioned in certain instructions given by him and agreed to by McAuley.

There can be no doubt, that, under this obligation, McAuley and his sureties would be liable to the plaintiff, not only for the moneys arising from the sales of the articles by McAuley himself, but also, for all "other moneys" collected by him during the continuance of the agency under the instructions of the plaintiff.

But it is argued that the recital, which is as follows,

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controls this clause, and limits the liability of the sureties. [The learned Vice Chancellor here read the recital, as set out on p. 320 *ante*.]

It is urged that the liability is thus limited to default in respect of goods furnished to McAuley for sale, and cannot be extended to promissory notes sent to him by the plaintiff for collection: that if the words "all other moneys," be, in themselves, wide enough to embrace the moneys the subject of this appeal, yet they are limited by the following, "at the times and in the manner mentioned in the said instructions of the said Fleury," which refer to the recital in the bond, and therefore apply only to the agency for sale and collection of the proceeds of such sales.

In this instrument we find, where we should reasonably look for it, in the condition, an exact statement of the obligation the sureties have undertaken. They are responsible for the general carrying out by McAuley of the agency he has accepted; they are also responsible for correct returns of the proceeds of the sales made; and, in addition, for all other moneys McAuley may collect.

The primary matter between the parties doubtless was, the agency for sale and collection; but we find after arranging for this that the covenant deals with moneys to be collected otherwise.

I do not see how we can distort the language of the bond, and conclude these "other" moneys did not mean "other moneys," but the same identical moneys which were already covered by the former paragraph in the condition. There is no reason why the Court should in this case strain the clear and unequivocal language used so as to exclude the further matters in respect of which the sureties have assumed a liability in favour of the plaintiff.

It is true where the language of the subsequent part of an instrument is ambiguous, the recital may act as a key to the intention of the parties; and where the recital shews plainly the purport of the document, there general words in the operative part may thus be controlled; but here, there is no ambiguity,—nor are the words general.

No authority would warrant the conclusion that, where an instrument contains a recital that a person has been appointed an agent for the sale of certain articles, and the collection of the proceeds of the sales, and the sureties of such person bind themselves to the payment of the moneys thus received, and also of all other moneys he may collect for the obligee during the continuance of such agency, the mere recital of the fact that the agent has been appointed to sell and collect, would justify the cancellation of that part of the bond that provides for this additional liability.

Nor do I think there is anything in the argument of the counsel for the appellants on the second point raised by him.

No doubt the instructions referred to in the condition, are the same as those mentioned in the recital; but there is not anything to limit these instructions simply to the prices to be set upon the articles the subject of the agency.

For one thing, they referred to the dealings of the agent then appointed in respect of the principal matters which fell to his lot in his engagement by the plaintiff, but there is not anything from which we could infer they were to be restricted to these alone. On the contrary, when the word instructions is used without anything to control it, it must be taken as meaning instructions on all the points as to which the principal may have desired to inform his agent, none of which could be more important than the period and manner of making remittances, whether arising from his own sales, or from collections from sales of others.

It is also to be observed that, in speaking of these other moneys, and when, if they were to be collected under what may be called the primary duty of the agent, they might have been designated by the addition of the words collected 'as such agent,' or 'under such agency,' we have in place, the same general words, 'during the continuance of the said agency.'

I am of opinion it was intended there should be the two matters embraced in this bond, that the wording of the instrument, clearly covers them; that the finding of the

words, extending a liability limited by the recital in respect of a particular matter, but they are words dealing with a subject other than that referred to in the recital. court below is correct, and the appeal should be dismissed with costs.

As I have come to a conclusion favorable to the respondent on the merits, I have not considered the question raised by him as to whether or not this is a case in which an appeal would lie.

Appeal dismissed with costs.

WILLIAM FULTON (Plaintiff in the Court below), *Appellant* v. ALFRED CUMMINGS and ELIZA FULTON (Defendants in the Court below), *Respondents*.

Ejectment—Will, construction of—Life estate—“Allowed to live on the land.”

J. F., by will dated 8th October, 1871, devised all his real property to his son (the plaintiff); he next devised his personal property, with slight exceptions, to his wife E. F.; and the fourth clause was, “My will is that my wife shall be allowed to live on the said property during the term of her natural life.” The last clause gave \$50 to his daughter, to be paid by plaintiff. On ejectment by the plaintiff against E. F. and another,

Held, per Morrison and Wilson, JJ., in the Court below, that the fourth clause gave the wife a life estate in the land. Per Richards, C. J., that at most it gave her a right to apply in equity to restrain the plaintiff from ejecting her.

On appeal the judgment below was affirmed.

APPEAL from a judgment delivered in Hilary Term, 1873, directing a nonsuit to be entered.

The action was one of ejectment for the west part of the west half of lot twenty-four, in the broken front of the township of London, in the county of Middlesex, containing fifteen acres more or less. The writ was originally sued out against Alfred Cummings alone, but Eliza Fulton, mother of the plaintiff, and Jane Cummings, wife of the defendant Alfred Cummings, were added by order of the Clerk of the Crown and Pleas, and by a subsequent order the name of Jane Cummings was struck out.

The remaining defendants defended for the whole land.

The plaintiff, by his notice, claimed to be entitled to the possession of the land, under and by virtue of a devise thereof from James Fulton. The defendant, Eliza Fulton, besides denying the title of the claimant, asserted title in herself as devisee under the last will and testament of James Fulton, deceased.

The cause was tried before Galt, J., at the Spring Assizes, 1872, at London.

The plaintiff opened his case on and from the will of James Fulton, dated 8th October, 1871, who died in possession. It appeared from the evidence that the testator had made a will not long before that, differing from this. He stated, however, he only made it for peace sake, that this was his true last will, and he desired the witnesses not to mention the fact of his signing this will, and particularly not to tell his wife.

The will above referred to, was as follows:—

“I, James Fulton, of the Township of London, in the County of Middlesex, yeoman, being of sound mind, memory, and understanding, do make and publish this my last will and testament, hereby revoking and making void all former last wills and testaments by me at any time heretofore made.

“First—My will is that all my just debts and funeral expenses shall be paid by my executors hereinafter named immediately after my decease.

“Second—I give and bequeath to my son William, all the real property that I shall die seized or possessed of, together with my library and books.

“Third—I give and bequeath to my wife, Elizabeth Fulton, all the personal property that I am possessed of (except my books and library).

“Fourth—My will is that my wife shall be allowed to live on the said property during the term of her natural life.

“Fifth—I direct that my daughter, Mary Roberts, shall be paid by my son William fifty dollars, to be paid to her within one year after my death.

“And I hereby nominate, constitute, and appoint Robert Sadler and my said son William executors of this my last will and testament.”

After the evidence in proof of the execution of the will

had been given, defendants contented themselves with moving for a nonsuit, on the ground that by the terms of the will proven, the plaintiff's mother (the defendant, Eliza Fulton,) having a life interest in the premises, and being one of the defendants, the action would not lie.

The learned Judge reserved leave to enter a nonsuit as to both defendants, or as to Eliza Fulton, and a verdict was entered for the plaintiff.

This will was dated the 8th October, 1871.

In Easter Term, 1872, *C. S. Patterson*, Q. C., obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved. This rule was enlarged till Hilary Term, 1873; when *R. A. Harrison*, Q. C., shewed cause.

The fourth clause of the will dated in October, "My will is, that my wife shall be allowed to live on the said property during the term of her natural life," read in connection with the devise to the plaintiff of the realty and to Eliza Fulton of the personalty, is not sufficient to give a life estate to Eliza Fulton. There is nothing in the clause more than the expression of a wish that his wife should be permitted to have a home there. The case of *Scouler v. Scouler*, 8 C. P. 9, will be relied on by the defendants, but the Courts appear to have been unwilling to follow that case: *Grant v. McLennan*, 16 C. P. 395; *McLennan v. Grant*, 15 Grant 65; *Gilchrist v. Ramsay*, 27 U. C. R 500; *Whiteside v. Miller*, 14 Grant 393. There is no estate in the defendant Fulton, reading the fourth clause alone, *Jarman on Wills*, 3rd ed. Vol. i. 444, and still less, reading that clause with the rest of the will. The last clause shews that the plaintiff is entitled to immediate possession: *Smith v. Holmes*, 14 U. C. R. 572. As to the right of defendant, Fulton to appear: *Harrison*, C. L. P. Act, 2nd ed., 518; *Butler v. Meredith*, 11 Ex. 85. The defendant having set up one defence by his notice of title, cannot rely upon another not set up in the notice; *Pettigrew v. Doyle*, 17 C. P. 459, in appeal. The defendant should not be allowed to claim independently of a defendant with whom she has defended jointly.

C. S. Patterson, Q. C., contra. There is no question as to the notice of title ; and if any such question is raised the rule should be amended so as to exclude it. The fourth clause of the will gives a life estate. Under that clause the defendant Eliza Fulton could not be turned off the land during her life, and, looking at the rest of the will, there is nothing to call for a different construction. The fifth clause bequeaths \$50 to the daughter, but there is nothing to shew that the bequest was to come out of the realty. [RICHARDS, C. J., Would allowing her to live in a room in the house answer the will?] The will may mean to give her the right to possession of the farm, or the right to make her living out of it. There is no provision as to dower.

Harrison, Q. C., in reply, referred to *Jarman* on Wills, 3rd ed., Vol. i., ch. 12, sec. 4, p. 356, and *Pierson v. Garnet*, 2 B. C. C. 38, 226, there cited. There is no wish to prevent the defendant, Eliza Fulton, from having a home on the land.

At the Sittings after Hilary Term the following judgments were delivered in the Court below :

RICHARDS, C. J. The will, so far as it is necessary to abstract it, after declaring that his debts and funeral expenses are to be paid by his executors immediately after his decease, is as follows :—

“Second, I give to my son William Fulton all the real property that I shall die seized or possessed of, together with my library and books. Third, I give to my wife Elizabeth all the personal property that I am possessed of, except my books and library. Fourth, My will is that my wife shall be allowed to live on the said property during the term of her natural life. Fifth, I direct that my daughter Mary Roberts shall be paid by my son William Fulton fifty dollars, to be paid to her within one year after my death.” And he nominated Robert Sadler and his son William executors of his will.

None of the authorities referred to shew that the words “My will is that my wife shall be allowed to live on the said property during the term of her natural life,” create

an estate for life. The most that can be said in favor of the widow is, that a Court of Equity might restrain the devisee from preventing her living on the place.

The words in *Scouler v. Scouler*, 8 C. P. 9, are: "I order that the said John Scouler's mother and my youngest daughter Cecily *shall have a lien or claim* on the said lands and tenements *as a home* during the term of either of their natural lives, [then after their decease the same shall *revert* to the said John Scouler and his heirs forever.]" The learned Chief Justice considered the words in brackets following the others quoted, indicated sufficiently the testator's intention to confer an estate for life. *Scouler v. Scouler* is the strongest case I have met for the plaintiff.

The other cases cited on the argument may be referred to, but the remarks made by Bovill, C. J., in *Gravenor v. Watkins*, L. R. 6 C. P. 504, will apply to this case: "It is extremely difficult to construe one will by the light of decisions upon other wills framed in different language. * * * The precise effect to be given to the will, where there are apparently conflicting devises, must in all cases depend upon the intention to be collected from the language of the will itself; and effect must, if possible, be given to every part of the instrument."

There the words of the will were such that if they stood alone in separate wills they would indicate the intention of the testator to give the whole of his estate to his mother, and the whole of it to his step-father. The Court of Common Pleas held the devise to the mother was for life, and to the step-father in remainder in fee. In the Exchequer Chamber the Court held that the devise to the step-father was in fee simple, without entering minutely into the question as to what was the precise nature of the estate given to the mother.

In *Mannox v. Greener*, L. R. 14 Eq. 461, before Vice-Chancellor Malins, there was the following devise: "In addition to this I leave her (his wife) all my furniture, plate, linen, pictures, &c., in my house at Stratford-on-Avon at my decease, and the free occupancy of any house in my possession, for her life, free of any payments or charges

whatever, after which the effects revert back to the estate." The Vice-Chancellor said that "the clause restricts the gift of the furniture and effects to an interest for life only, as it is to *revert* back to the estate, but the direction that she is to have the free occupancy of any house in the possession of the testator would entitle her, in my opinion, either to reside in the house or to let it, as she may think fit."

I merely refer to this last case as shewing a somewhat similar provision as to the occupancy by the wife. It is not stated in the argument or judgment that she took any estate in the land on which the house she occupied was situate. This probably would not be necessary, as there the estate was being administered under the direction of the Court. As far as I can gather from the more recent cases, Courts of Equity are not disposed to extend the rule of construction in relation to trusts.

In the last edition of Mr. *Jarman's* work on Wills, he states, in effect, that the Courts seem to consider they have gone far enough in investing with the efficacy of a trust loose expressions which it is probable were rarely intended to have such an operation; and the decisions have established that there is a distinction when the words of gift are such as expressly to point to an absolute enjoyment by the donee himself, and in such case subsequent words of request, recommendation, or the like, would not generally operate to affix a trust on the prior absolute gift.

Here, I should say, the intention of the testator is sufficiently apparent to justify a Court of Equity in interposing so as to allow the testator's widow to live on the property during the term of her natural life. In this view I understood Mr. *Harrison* to say that the plaintiff had no desire to prevent his mother from living on the property, and was willing to enter into an undertaking not to disturb her in such possession. In the event of his doing so, I see no reason why this rule should not be discharged.

MORRISON, J.—I have found it very difficult upon examination of the authorities to arrive at a clear or satisfactory

decision, but on the whole, I concur in the conclusion that my brother Wilson has arrived at, as I think the weight of authority is in favor of the defendants.

WILSON, J.—I think the defendant, the mother of the plaintiff, is entitled either to the sole possession of the land during her life, or to possess it in common with the plaintiff for that period.

The provision that on the death of the two women the land should “revert to J. S., his heirs and assigns forever” was nothing more than would have followed from the previous life estates given when they happened to fall in.

That provision about reverting did not prove that the two women were to have a lien or claim on the land as a home *to the exclusion* of J. S. during their lives.

They might have had a lien or claim for a home on the land, which would revert on their deaths to J. S. without necessarily excluding J. S. from the whole land, or from some estate or interest in it as tenant in common with them or otherwise during the continuance of the life estate.

But that case was decided as giving the women the sole right of possession of the land during their lives.

In that respect I do not see how it differs from the one in hand.

In *Mannox v. Greener*, L. R. 14 Eq. 456, the clause of the will was “In addition to this I leave her (the testator’s wife) all my furniture, plate, linen, pictures, &c., in my house at Stratford-on-Avon, at my decease, and the free occupancy of any house in my possession, for her life, free of any payments or charge whatever, after which the effects to revert back to the estate.” And it was held that the words “free occupancy” not only entitled the wife to reside in the house but to rent it if she chose for her life.

The word “*occupancy*” was the one which conferred the estate. The word “*free*” applied only to the enjoyment of the house free from payments or charges.

The term “*occupancy*” can be no stronger than “*live*

on," which is used here. If a document were drawn; "I allow A. B. to live on my land during her natural life," that would be a good lease for life.

So if one were to convey land to another, and to insert in it, "A. B. being allowed to live on the land for her life," and she were a party to it, she would take an estate for her life.

The principal question with me has been whether the defendant is entitled to take the land for her life in common with the plaintiff, or solely to his entire exclusion for her life. I am disposed to think she is entitled to it solely for her life. The cases before mentioned support that view.

The case of *Right et al. v. Proctor*, 4 Burr, 2209, is perhaps more directly in point, as the very question was there raised and decided. The facts were that one Green was seized in fee of a house, a brewery, and the stock in it. Proctor agreed to buy a fifth share of it all. Articles of partnership were drawn. In them Green covenanted that the trade should be carried on between himself, Ekins, and Proctor; that he, Green, should pay £300 for the yearly rent of the house, and that Proctor "shall reside and dwell in the house free of all rent," &c., and if he, Green, died, his executor should renew the lease to Proctor. Green brought ejectment against Proctor. For the plaintiff, it was contended that Green had not excluded himself from a joint occupation, and if the words did not import it, the Court could not force such a construction; that Green had either the sole legal right or was joint tenant with Proctor.

Lord Mansfield, C. J., said at p. 2210, "The plaintiff cannot recover against his own covenant. * * * Proctor was to have the use and occupation of it (the house), and be bound to reside there * * * and if Green should die, his executor was bound to renew the lease to Proctor, and Proctor did live in the house. Green has no right to recover." Yates, J., said, "Even as a license to inhabit, it amounts to a lease, and it appears most plainly to be intended that he was to reside in it."

The devise to her that she should be allowed *to live on the property* seems to be just the same as a devise of it to her to live upon.

A grant or devise of the profits of land will pass the land itself: *Shep. Touch.*, 97,456; *Manning's Case*, 8 Co. 94 b.; *Stewart v. Garnett*, 3 Sim. 398; *Doe d. Goldin v. Lakeman*, 2 B. & Ad. 30, 42. A devise of the *occupation* of the land will pass the land: *Manning's Case*, 8 Co. 94 b. A covenant that one *may reside and dwell* in a house is a good lease of it: *Right d. Green v. Proctor*, 4 Burr. 2209; or that one may have the land or take the profits, for it is all one which expression is used: *Parker v. Plummer*, Cro. Eliz. 190. A license to *enter and enjoy land* for a time certain is a good lease: *Hall v. Seabright*, 1 Mod. 14; *Jepson v. Jackson*, 2 Lev. 194; *Trever v. Roberts*, Hard. 366; *Right d. Green v. Proctor*, 4 Burr. 2210, per Yates, J. The words here used, "shall be allowed *to live on the property*," are quite as strong as any of those referred to.

So also she "shall be *allowed to live on the property*" is an expression not only stronger than those words of recommendation, wish, or expectation, which are addressed to devisees and legatees with respect to other persons, and which are held to constitute a trust in favor of such persons, but it is an expression of a different character—it is a direct devise.—"*My will is*, that my wife *shall* be allowed to live on the property." It is a devise not depending on the favor or conduct of the son at all, in any respect, but it is one which the mother has and is entitled to in her own right and adversely to her son.

The words in *Scouler v. Scouler*, 8 C. P. 9, are no stronger than they are here. There, as here, the land was by a preceding clause given to a particular person in fee, and there followed in that case this clause: "I order that the devisee J. S's. mother and my youngest daughter Cecily shall have a lien or claim on the land as a home during the term of either of their natural lives. Then after their decease the same shall revert to the said J. S., his heirs and assigns forever."

Whether the defendant has a sole and exclusive right to the possession for her life, or in common, or otherwise with the plaintiff, is of no consequence in one view of this action, for in either case the plaintiff should not recover, unless there was an actual ouster.

If the defendant have not defended as a tenant in common, and if she desire to do it, she should be allowed now to do so. If, however, she contend she has the sole right to possession, I think I must decide that in her favor.

In my opinion the rule should be made absolute.

From this judgment the plaintiff appealed, on the grounds:—

1. That the defendant Eliza Fulton took no estate under the will of James Fulton dated 8th October, 1871. 2. She ought not to be allowed, in this action, to set up an estate under the said will, having, by her notice of title, set up a different will, and having at the trial contested the validity of the first-mentioned will, and failed in the contest. 3. Her contention as to a life estate under the will dated 8th October, 1871, even if well founded and open to her in this action, could not avail the co-defendant, Alfred Cummings, so as to entitle both the defendants to non-suit the plaintiff. 4. The plaintiff, having proved the title of which he gave notice, and the title set up by defendants having been disproved, the plaintiff ought not to have been non-suited. 5. The rule *nisi*, or so much as asks leave to enter a non-suit, should have been discharged.

The case was argued in appeal on the 24th June, 1873. (*a*.) *Harrison*, Q. C., for appeal, used the arguments urged by him in the Court below, and cited, in addition to the cases there cited, *Mannox v. Greener*, L. R. 14 Eq. 456, on the question of construction of the will. He also

(*a*) *Present*: DRAPER, C. J. of Appeal; RICHARDS, C. J.; SPRAGGE, C.; MORRISON, J.; WILSON, J.; GALT, J.; STRONG V. C.; BLAKE, V. C.

said that the issue at the trial was not whether defendant had a life estate or not, and she had no right to have an improper issue tried or discussed: *McCallum v. Boswell*, 15 U. C. R. 343; *Leech v. Leech*, 24 U. C. R. 321; *McKinley v. Bowbeer*, 11 U. C. R. 86; *Orser v. Vernon*, 14 C. P. 573; *Fields v. Livingston*, 17 C. P. 15. If Eliza Fulton had the right to live on the place, that is no reason why the plaintiff should not recover against the co-defendant. The plaintiff proved his notice of title, yet he was nonsuited. He referred also to *Butler v. Meredith*, 11 Ex. 85.

C. S. Patterson, Q. C., in addition to the cases cited by him on the argument below, referred to *Gravenor v. Watkins*, L. R. 6 C. P. 504, and the cases cited in the judgment of Wilson, J., and to *Doe d. Hellyer v. King*, 6 Ex. 791; *Cole on Ejectment*, 286; and he relied upon the same arguments which he had pressed upon the Court below. The whole property was only fifteen acres, and the testator had made no other provision for his widow.

12th January, 1874. DRAPER, C. J. of Appeal (*a.*).—The plaintiff in ejectment must recover on the strength of his own title.

He claims in this case possession of the premises named in his writ, and “to eject *all other persons* therefrom.” If, therefore, any defendant denies the right so claimed, by reason of another right inconsistent with the plaintiff’s claim, and which right appears in the evidence which the plaintiff is under the necessity of relying on as the foundation of his own claim, the plaintiff cannot recover.

The defendant Eliza Fulton denies the plaintiff’s claim to exclusive possession. His claim is to dispossess her. He produces his title, which shews that he has no right to

(a) *Present*: DRAPER, C. J. of Appeal; RICHARDS, C. J.; SPRAGGE, C.; HAGARTY, C. J., C. P.; MORRISON, J.; GALT, J.; STRONG, V. C.; BLAKE, V. C.

dispossess her. Admit that she, as a matter of defence, set up something which she has not attempted to prove, that will not supply a defect in the plaintiff's case, which requires proof of a right to eject *all* other persons. He has failed in sustaining his claim to eject her. On this short ground I think the appeal must be dismissed with costs.

It may be as well to observe that the exhibit No. 2, purporting to be a will of the deceased, James Fulton, is not referred to in the statement taken, as is set forth, from the notes of the learned Judge who tried the cause, and, according to those notes, was not offered in evidence; and, if so, it certainly forms no part of what should be before this Court on the appeal (*a*). The learned counsel for the appellant referred in his opening to there being two wills, and in the testimony of Hugh Williamson he states that the testator, before executing the will which Williamson signed as a witness, said, "The will I have made I was forced to do for peace sake,"—but no second will was proved.

I think the appeal should be dismissed with costs.

BLAKE, V. C.—1. "My will is." These words appear in the first and fourth clauses of the will, and it is evident they mean, "my last will and testament is". It is clear this must be the meaning to be attributed to the words in the first clause; and there is no reason for giving a signification different in the one case from the other. I am of opinion that this is not a mere expression of the wish of the testator, but a devise in favor of the widow.

(*a*) This was a will, purporting to be the will of James Fulton, dated 20th July, 1871, and was as follows:—

"The last will and testament of James Fulton, being of sound mind.

"I leave my wife all my property during her life, and after to my daughter, Jane Cummings, and after her death to her son, James F. Cummings, but can neither sel nor mortgage nor leas longer than three years.

"I leave my daughter, Mary Roberts Fifty dollards, with all my useful books. I leave my son William one dollard.

"I appoint my wife and Robert Sadler, of Biron, John Bardley, sener, 4 concession, my executors."

2. Under the fourth clause, which is as follows: "My will is, that *my wife* shall be allowed to live on the said property during the term of her natural life." The said property there spoken of must refer to that in the second clause as "all the real property;" therefore the wife is, under this will, "allowed to live on all the real property during the term of her natural life."

I cannot see what else is to be given to the widow under this will, unless it be an estate for life. I think, in a will drawn as the present, where technical language is not used, and where no other provision is made for the widow, the proper reading of the expression, "my wife shall be allowed to live on the said property during the term of her natural life," is, to give the widow such an estate in the land as will allow her the free and the full enjoyment of the land for her life.

In my opinion the correct reading of the will is, I give an estate in fee to my son William, and out of that I carve an estate for life in favor of my widow.

Appeal dismissed, with costs.

HILARY TERM, 37 VICTORIA, 1874.

(2nd February to 14th February.)

Present :

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

JONES V. COWDEN AND FRASER

Tax sale—Registration of Sheriff's deed—Evidence—Defects cured by Statutes.

In ejectment the plaintiff claimed under a tax sale made in 1839. The sheriff's deed was made on the 10th July, 1840, but not registered until the 18th July, 1861. The defendant claimed under the heir at law of the patentee, by deed dated the 18th of May, and registered on the 5th July, 1855, being the first deed registered upon the land.

Held, Wilson, J., *dissentiente*, that the title being an unregistered one when the sheriff's deed was given, that deed did not then require registration to preserve its priority; that having been registered before the 29 Vic. ch. 24, sec. 57, repeated in 31 Vic. ch. 20, sec. 59, O. it was unnecessary to re-register under those Acts; and that the plaintiff's title must therefore prevail.

The sheriff's certificate on which the deed was registered, though dated 10th July, 1840, had written on it in the handwriting of R., who was sheriff in 1840, but had gone out of office before 1861, "Duplicate 1861," and in it the sheriff was described as Sheriff of the United Counties of N. & D., which were not united until 1850.

Held, that these informalities were insufficient to avoid the registration. Per Wilson, J., The sheriff who had sold the land and made the deed was a competent person to give the certificate for registry, though out of office; and the registrar having acted upon it, though he might perhaps have refused to do so owing to its informality, the registration was good.

A book was produced dated 24th June, 1820, signed by the Surveyor General, containing a list of grantees and the lots granted, with the number of acres in each lot, in which this lot appeared, with the name of Elizabeth Hay opposite to it, and the letter D. opposite her name; and it was shewn that the lot was granted to her in 1817.

Held, sufficient evidence that the lot had been returned as described for patent, though there was no heading to the book, describing its subject or object.

Held, also, that this objection, and the objections that there was no evidence that the taxes had been properly imposed by the Quarter Sessions, or of the sheriff's advertisements of sale, were, under the evidence stated in the case, cured by the 32 Vic. ch. 36, sec. 155, O., and the 33 Vic. ch. 23, O.

The plaintiff's right to a lien on the land under 33 Vic. ch. 23, O., and the mode of enforcing it, if the tax title had been invalid, remarked upon by Wilson, J.

EJECTMENT for 190 acres, specially described, of lot No. 22, in the 1st concession of the township of Manvers.

The plaintiff claimed as devisee under the last will and testament of the late George Elias Jones.

Unice Cowden, beside denying the plaintiff's title, claimed title in herself under the grantee of the Crown; and William Fraser, beside denying the plaintiff's title, claimed title in himself under a deed to him from one Archibald Fraser.

The cause was tried at Cobourg, at the Spring Assizes of 1873, before Richards, C. J., without a jury.

The plaintiff claimed under a tax title, in the following manner:—The tax sale was by the late Sheriff Ruttan, on the 9th of July, 1839, to William Sykes. The tax deed was made to him on the 10th of July, 1840, and it was registered on the 18th of July, 1861; but the binding effect of the registration on the certificate of the sheriff given when he was out of office, and describing him as Sheriff of the United Counties of Northumberland and Durham, when there was no such territorial division at the time of his sale or of his giving the certificate, was disputed.

Sykes mortgaged the land to George E. Jones, who foreclosed the mortgage and devised to the plaintiff.

The defendant's title was as follows:—Patent, 30th September, 1817, to Elizabeth Hay, of the whole lot. She died intestate about 1828. She left her husband, two sons and two daughters surviving her.

John J. Hay was the elder son and heir at law of his mother. He died intestate before 1850, not having been married.

His brother Alexander, as the estate descended *ex parte maternâ*, and as the person next in order who could trace his descent from the purchaser, his mother, succeeded to John. [*Langley v. Sneyd*, 1 S. & St. 4555; *Doe d. Blackburn v. Blackburn*, 1 M. & Rob. 547.]

Alexander, on the 8th of May, 1855, sold to Archibald Fraser, who registered his deed on the 5th of July, 1855.

Archibald Fraser sold to William Fraser, one of the defendants, on the 12th of March, 1856, who registered his deed on the 1st of August, 1857.

William Fraser by agreement in writing of the 1st of April, 1869, contracted to sell to James Cowden. This contract had not been registered.

James Cowden died intestate, leaving his wife Unice, one of the defendants, in possession.

Many objections were taken to the plaintiff's right to recover under his tax title, and among them, it was contended, however perfect the title might be in other respects, that as the sheriff's deed of the 10th of July, 1840, was not registered until the 18th of July, 1861, and more than six years after the registration of the deed from Alexander Hay to Archibald Fraser, the defendants were entitled to the possession by reason of the priority of registration.

The verdict was entered for the defendants, with leave to the plaintiff to move on the case and evidence.

In Easter Term, 1873, *J. W. Kerr* obtained a rule *nisi* to set aside the verdict for the defendants and enter a verdict for the plaintiff for the whole or for two equal undivided third parts of the land in question in this cause, on the law and evidence, pursuant to leave reserved, and according to the provisions of the Law Reform Act.

S. Richards, Q. C., and *Benson*, shewed cause.

1st. The sheriff's deed is void because there is no return of the Surveyor General, which is the foundation of the whole proceedings. A book was produced with the names of the lots in it, but it had no heading to indicate what it was. At the very back of this book, several blank pages

having intervened since the last entries, a date was given and it was signed "Thomas Ridout, Surveyor General." There was no evidence given to explain this book or identify it as a return. 2nd. There was no evidence of a tax having been imposed under 59 Geo. III. ch. 7. The treasurer's book shewed no assessment or charge against the land. The land had been sold for taxes in 1829, was bought by one Brown, and was redeemed and sold again to Sykes in 1839. Up to 1829, the entry is, "Taxes paid by Sheriff," and from 1829 to 1839 the same. The amount of taxes at the time of the last sale, was £3 5s. ; and it was made up in this way: 200 acres at $\frac{1}{8}$ d. per acre, under 59 Geo. III. ch. 8, sec. 3, for road tax, 2s. 1d., which for eight years would

Amount to	£0	16s.	8d.
Add 50 per cent under 9 Geo. IV. ch. 3. sec. 4.	0	8s.	4d.
	<hr/>		
	£1	5	0
	<hr/>		

Then an assessment of 1d. in the £ on 200 acres at 4s. per acre, under 59 Geo. III. ch.

7, sec. 3. 3s. 4d. per annum, and for eight years.	1	6	8
Add 50 per cent.	0	13	4
	<hr/>		
	£2	0	0

Which added to the 25s. makes the £3 5s. returned as in arrear. Under the case of *Cotter v. Sutherland*, 18 C. P. 357, 404, no tax except road taxes could be imposed except by the Quarter Sessions, and there was nothing to shew that the Sessions had imposed any tax. 3. There was no other evidence of the advertisements having been published by the sheriff, than two slips of paper apparently cut from a newspaper and pasted in the back of the sheriff's book. As to this, see *McMillan v. McDonald*, 26 U. C. R. 454.

It was not sufficiently shewn, therefore, that there were any taxes in arrear, and this being the case, the sale was not made valid by 32 Vic. ch. 36, sec. 155, O. : *Hamilton v. Eggleton*, 22 C. P. 536.

But assuming the deed to be valid, the defendants are entitled by priority of registration. The deeds from Alexander Hay to Archibald Fraser, and from Archibald Fraser to William Fraser, were registered before the sheriff's deed to Sykes, which was only registered in 1861. The Registry Laws apply to sheriff's deeds. Secs. 19 & 20 of 6 Geo. IV. ch. 7, provide how a sheriff's deed is to be registered, and require the sheriff to give a certificate to the registrar. This implied that such deeds must be registered. Consol. Stat. U. C., ch. 89, sec. 34, shews that the registrar is to enter the certificate in his book. On the subject of registration of sheriff's deeds, see *Doe d. Brennan v. O'Neill*, 4 U. C. R. 8; *Brugere v. Knox*, 8 C. P. 520; *Waters v. Shade*, 2 Grant 457; *Warburton v. Loveland*, 2 Dow & Cl. 480. The question was also raised in *Bell v. McLean*, 18 C. P. 416, and *Doe d. Russell v. Hodgkiss*, 5 U. C. R. 348, but not decided. 29 Vic. ch. 24, sec. 62, repeals the former acts, and saves prior registration, but not prior rights. 31 Vic. ch. 20, sec. 64. O., is in the same words as the Act of 1865; and sec. 2 of that Act only repeals inconsistent Acts. If section 64 embraced all deeds in the past, it might work hardship, but it is difficult to say it does not. Are then 31 Vic. ch. 20, O., and 29 Vic. ch. 24, retrospective as to priority of registration? Sec. 59 of the former Act requires the sheriff's deed to be registered in a year, as does sec. 57 of the Act of 1865. If we had not priority before, we had it when the action was brought, for the sheriff's deed was not registered within a year from either Act; and when registered in 1861, the registry was defective and void. Both a delivery of the certificate by the sheriff to the registrar and an entry in the books of the latter, are necessary to a perfect registration. It is not pretended there was a proper certificate given by the Sheriff to the Registrar; the certificate given in 1861, was given by a person then out of office; and there is no evidence of how it reached the registrar. It is submitted that it is necessary to shew it reached him from the sheriff. We find in the sheriff's

book, after some memoranda about the sale to Sykes, in the hand-writing of Mr. Henry Ruttan—"Duplicate 1861." The certificate produced, was headed "Duplicate 1861," in the writing of Mr. Ruttan. It is to be presumed then that the duplicate is that referred to in the book, and that it was given in 1861, and after Mr. Ruttan ceased to be sheriff in 1857. This certificate is given as Sheriff of Northumberland and Durham, which Mr. Ruttan was not till 1850, and it would not be valid unless given before 1851, when 13 & 14 Vic. ch. 66, repealed the former Acts, without reserving rights under them: *McDonald v. McDonald*, 24 U. C. R. 74; *McDonald v. McDonell*, 24 U. C. R. 424; *Bryant v. Hill*, 23 U. C. R. 96. 13 & 14 Vic. ch. 66, gave no enlarged powers to sheriffs, it enabled a registrar to register the deeds. Consol. Stat. U. C., ch. 89, sec. 34, passed after Ruttan ceased to be sheriff, provided for the removal of the difficulty, and the plaintiff could have got a valid certificate from Sheriff Fortune. See also *Doe Young v. Smith*, 1 U. C. R. 195.

Next, the certificate is not under the seal of office of the sheriff. There is no authority as to what a seal of office is; but it is important there should be, because the registrar has to act upon it.

C. S. Patterson, Q. C., and *J. W. Kerr*, supported the rule. As to the return by the Surveyor General, it is shewn that the book came from the Surveyor General's office, and that the land was patented. There was sufficient evidence given also that the tax was properly imposed. It will not be presumed that the treasurer did not make the proper return. In *Cotter v. Sutherland*, 18 C. P. 357, it was shewn affirmatively that the tax was not properly imposed. It is not necessary to prove the advertisements, but if necessary enough has been shewn, for in the Sheriff's books we find advertisements cut out from newspapers referring to this sale. In one case,—*Todd v. Werry*, 15 U. C. R. 614—a sale under this warrant has been held good. But even if there has been any irregularity, it has been cured by 29 & 30 Vic. ch. 53, sec. 156, and 32 Vic. ch. 36,

sec. 155. *Hamilton v. Eggleton*, 22 C. P. 536, does not apply, for there it was shewn the taxes had been paid. On the same point see *Yokham v. Hall*, 15 Grant 335, overruled by *Bank of Toronto v. Fanning*, 18 Grant 391. The two-years clause applies here, and cures the objections if they had any weight.

The effect which the plaintiff attempts to give to the Registry law would be disastrous, if it applied to all titles under sheriff's sales, and if whether the sales took place before registration was necessary or not, it was now necessary to register within a year after the act 31 Vic., ch. 20, sec. 59. If any other meaning can be given to the statute the Court should hesitate before enforcing the meaning contended for. The plaintiff had an unregistered title, and had no need to register to gain priority. The deed, however, has been properly registered. In none of the cases cited had any registration been held void for defect in the form of proof. The registrar might possibly have refused to register on this certificate, but he was not bound to do so. The certificate is in proper form, and, even if given in 1861, which is not admitted, it is still good. The sheriff having made the sale while in office, could make the deed but for the repeal of the statute: *Doe d. Tiffany v. Miller*, 6 U. C. R. 426; *Doe d. Tiffany v. Miller*, 10 U. C. R. 65; *Burnham v. Daly*, 11 U. C. R. 211; *McMillan v. McDonald*, 26 U. C. R. 454. And if he could give a deed why not a certificate? The greater includes the less. It is said, however, that the statute under which he could act is repealed, but Consol. Stat. U. C., ch. 89, revived the power to grant the certificate.

The production of Elizabeth Hay's patent did away with the necessity of proving the Surveyor-General's return. The following authorities also apply: *Errington v. Dumble*, 8 C. P. 65; *Monro v. Grey*, 12 U. C. R. 647; *Doe d. Bell v. Reaumore*, 3 O. S. 243. *Burnham v. Daly*, 11 U. C. R. 211, is a case of sale under a *fi. fa.*; but it applies equally to tax sales. See, also, *Campbell v. Fox*, 26 U. C. R. 631; *Beattie v. Mutton*, 14 Grant 686. As to the

title of Alexander Hay, he had none, as his father died after him. As to registration, see also *Magrath v. Todd*, 26 U. C. R. 87; *Moffatt v. Grover*, 4 C. P. 402. As to the power of the sheriff when out of office, *Charles v. Dulmage* 14 U. C. R. 585; *Ryckman v. Van Voltenburg*, 6 C. P. 385.

WILSON, J.—By the original Registry Act, it was not compulsory to register until a memorial of some deed, devise, or conveyance relating to the land had been duly registered, and the Act had no operation until the patent of the land from the Crown had issued. That continued to be the law, notwithstanding the re-enactment and amendment of the original Act by 9 Vic. ch. 34, until the 13 & 14 Vic. ch. 63, which took effect on the 1st January, 1851.

By sec. 3 of that Act, all deeds, devises, and conveyances made after the grant from the Crown had issued, and after the 1st of January, 1851, were required to be registered in order to preserve their priority.

The Consol. Stat. U. C. ch. 89, contained the old enactment as to such cases as were still within it, by sec. 44; and the new enactment as to all deeds made since the 1st of January, 1851, in sec. 53.

The later Acts, 29 Vic. ch. 24, sec. 62, and 31 Vic. ch. 20, sec. 64, O., require registration of all instruments after the grant from the Crown has issued.

Deeds made by sheriffs on sales by execution were within the registry laws when the title was a registered title, before the Acts of 1865 and 1868 expressly required them to be registered.

The cases of *Doe d. Brennan v. O'Neill*, 4 U. C. R. 8; *Waters v. Shade*, 2 Grant 457, 465, 482, 485, 486; and *Bruyere v. Knox*, 8 C. P. 520, in our own Courts; and also the English cases of *Doe d. Robinson v. Allsop*, 5 B. & Al. 142; and *Warburton v. Loveland*, 2 Dow & C. 480, which are to the same effect, establish the application of the Registry Act to such kinds of conveyances.

Until the 1st of January, 1851, there was a distinction

between what were called registered and unregistered titles. In the former case, all conveyances, &c., had to be duly registered. In the latter case, no conveyance was required to be registered, for no person was obliged to bring his land within the operation of the registry law; that was left to the "election of the party or parties concerned."

As to all conveyances, &c., made after the 1st of January, 1851, the distinction may be said to have ended, as it became necessary from that time to register every conveyance, &c., after the patent had issued.

There were special enactments relating to the registration of tax deeds and conveyances, by the 6 Geo. IV. ch. 7. They remained in force until that Act was repealed by the 13 & 14 Vic. ch. 66.

The 16 Vic. ch. 182, sec. 66, enabled registrations to be made, as they were made before, under the 6 Geo. IV. ch. 7, and that clause was embodied in the Consol. Stat. U. C. ch. 89, sec. 34.

The 6 Geo. IV. ch. 7, did not, in terms, make it compulsory to register the Sheriff's deed, and the question is, whether that was not the meaning and operation of the Act.

By the 17th section, the purchaser, on payment of the purchase money, was to receive from the sheriff a certificate under his hand specifying the particulars of sale, and the purchaser might then go forthwith into possession, and retain it, unless the land were redeemed within the year.

Perhaps that certificate might have been registered as a conveyance, by the terms of the general Registry Act. It certainly did affect land both at law and in equity.

The 6 Geo. IV., ch. 7, made no provision with respect to the registration of that certificate.

By the 19th section the sheriff was required, before he delivered the conveyance to the purchaser, to deliver to the [registrar of the county in which the land lay a certificate of the sale, under his hand and seal of office, stating the name of the purchaser, &c., which certificate was to be to the registrar a sufficient authority, in place of a memorial, to record such conveyance.

And by section 20, the Registrar, having received such certificate from the sheriff, was, on production to him of the deed, to enter on record a transcript of the deed, which should be deemed a sufficient registry.

These provisions, as before mentioned, remained in force till the 1st of January, 1851, and from the 1st of January, 1854, for registration purposes, until the Act of 1865 was passed.

Expressing my own opinion only, as I did also in *Bell v. McLean*, 18 C. P. 416, I think it was obligatory to register titles acquired under the 6 Geo. IV., ch. 7, because the sheriff was required to deliver the certificate of such sale to the registrar before he gave the deed to the purchaser; and the purchaser of such a title was protected against the subsequent patentee of the land: *Charles v. Dulmage*, 14 U. C. R. 585; *Ryckman v. Van Voltenburg*, 6 C. P. 385. And I think the Acts of 1865 and 1869 indicate that it was the design of the Legislature that such conveyances should be registered, otherwise the reference in these Acts, as to preserving their priority, could have no proper application. There could not have been a priority if there had not been the obligation to register to secure it.

And it seems only reasonable that those who were buying from the patentee, or from the locatee, so as to become the patentee, should have every means of and facility for getting information as to the title of the land placed within their reach before they purchased.

The 29 Vic. ch. 24, sec. 56, has made it compulsory in express terms to register such deeds, and sec. 57 required that all deeds for lands sold for taxes, or under process of law, before the passing of that Act, should be registered within one year after the passing of the Act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith, who may have acquired priority of registration."

The Ontario Act, 31 Vic. ch. 20, secs. 58 & 59, re-

enacts secs. 56 & 57, of the Act of 1865, in the same words.

The sheriff's deed was not registered under these Acts.

It was registered in 1861, and if that registration were valid in itself, or would have been valid and effectual if the prior registrations, in the years 1855 and 1857, of the deeds under which the defendants claim had not been made, then it was not necessary for them to register under the Acts of 1865 or 1868.

It was contended by the plaintiff's counsel that the deed in question was registered within a year after the passing of the first of these Acts, because it was registered before the term of that year had expired, by having been registered before the Act itself was passed. And it was contended also that the registration of 1861, made before the passing of the Act, made it unnecessary to register it over again after the Act was passed.

Assuming, for the present, that it was not incumbent to register this deed before the Acts of 1865 and 1868 were passed, because at the time it was made, in 1840, the title was not then a registered title, and assuming that the registration became necessary only by virtue of the Acts of 1865 and 1868, then we must determine whether the registration which was made in 1861 was formal and sufficient against the objections which have been made to it.

I may say here that in my opinion, if a registration before the Acts of 1865 and 1869 were in the option of the purchaser—and if he, nevertheless, did register before these Acts—that he was not obliged to repeat the registration under the Acts.

The objections to the registration of 1861 are to the certificate on which the registration was made, and to the person who gave the certificate.

The certificate had written on it in pencil, "Duplicate 1861," in the writing of the late sheriff Ruttan, but long after he was out of office.

The instrument was dated 10th July, 1840, but it was said it could not have been given then, because in it the

sheriff is described as sheriff of the "United Counties of Northumberland and Durham"; and it states that the sheriff had put his hand and seal to it, in the County of Northumberland, "one of the United Counties of Northumberland and Durham," and there was no such union of counties until the 12 Vic. ch. 78, which came into force on the 1st of January, 1850. And it was not given under the seal of office of the sheriff. And the person who gave it, it is said, was not the sheriff at the time he did give it.

There is strong reason to believe, from the internal evidence of the certificate, that it was not given until after the 1st of January, 1850, and so that it was not given at the time it bears date. That being so, the onus was cast upon the person relying on it to shew the true time of its execution: *McMillan v. McDonald*, 26 U. C. R. 454, and the passage from Mr. Justice Macaulay's judgment in *Doe dem. Tiffany v. Miller*, 6 U. C. R. 448, referred to in the former case at p. 457.

When Mr. Ruttan ceased to be sheriff was not shewn. He might have given it in the course of the year 1850, for at that time there were unions of counties, and because the 6 Geo. IV. ch. 7, was still in force.

But by the 13 & 14 Vic. ch. 66, which came into operation on the 1st of January, 1851, the 6 Geo. IV. ch. 7, was repealed; and until the 16 Vic. ch. 182, passed on the 14th of June, 1853, such deeds could not be registered on the mere certificate of the sheriff. So that, if the certificate was given in that period it was void. By the 66th section of the Act of 1853, the registrar of every county was again authorized to register any sheriff's deed of land sold for taxes before the 1st of January, 1851, according to the provisions of the 6 Geo. IV. ch. 7, notwithstanding its repeal. And that enactment continued until the Consol. Stat. U. C. ch. 89, sec. 34, took effect.

I think the internal evidence and the pencil memorandum, "Duplicate 1861," in Ruttan's writing, raises a presumption that the document was not given until 1861; and at that time, and it is said for some years before, Ruttan was not the sheriff.

I think on the evidence there is it cannot be assumed there was an earlier original document in 1840, or at any other time, because the one was marked duplicate; nor that the document, or any other document in the nature of a certificate for registration purposes, was granted before the year 1861; and that it must be considered that certificate was given at a time when Ruttan was not in office as sheriff.

The questions then are, whether the certificate, if assumed to be formally correct, could have been legally given by Mr. Ruttan in the year 1861.

The 6 Geo. IV. ch. 7, sec. 18, enacted "That if at the expiration of twelve calendar months from the time of such sale, the land so sold shall not be redeemed, then the sheriff *for the time being* shall on demand by the purchaser or purchasers, his heirs, or assigns, execute a conveyance," &c.

This provision was so expressed to guard against the contingency of the death, or removal from office, of the sheriff who made the sale, within the twelvemonth, in which case the sheriff *for the time being* was to make the deed; or of the death of the purchaser, in which case the deed was to be made to his heirs or assigns.

Then section 19 enacted "That before the sheriff shall deliver to a purchaser any conveyance of lands sold under this Act, he shall deliver to the register of the county in which the lands are situated a certificate of such sale under his hand and seal of office, stating the name of the purchaser * * which certificate shall be to such register a sufficient authority, in place of a memorial, to record such conveyance."

Under that clause the sheriff who made the deed was the one who was to give the certificate and to deliver it to the registrar. That was the case here, but at the time the certificate was given Mr. Ruttan, who had made the deed, was not in office as sheriff.

I think Mr. Ruttan was the proper person to give the certificate, and that he could give it, although he was at the time out of office. See also the Ontario Act, 33 Vic. ch. 23, sec. 5.

There is nothing in the Statute opposed to such a decision. It does not say the sheriff for the time being shall give the certificate, but the conveyance only. If the sheriff made such a deed on the 1st of a month, and were removed from office on the day following, he might, I think, on the day after that again, give his certificate to the registrar for the purpose of having the deed he had made registered.

There is here a greater lapse of time between the deed and the certificate, but I do not see what difference that can be in law, except perhaps to prejudice the purchaser's title by the intervening claims of others, if any such have arisen by reason of the delay.

The rule should apply in such a case as this, that those duties which the sheriff had begun to execute he should have the authority, as well as be under the obligation, to complete, by analogy to the like duties of the sheriff under writs of execution.

As the sheriff while he was in office had made the deed to the purchaser, this case does not come within the 27-28 Vic. ch. 28, sec. 43.

I am therefore of opinion that the sheriff who sold the land, and made the deed, was the person, or a competent person at any rate, under the Statute to give the certificate, and that he had the power to give it, although at the time he made it and delivered it to the registrar he was not then in office.

Then as to the form of the certificate. It was not disputed that Mr. Ruttan was Sheriff of the United Counties of Northumberland and Durham after the creation of these territorial divisions, and so at one time would have been rightly described as sheriff of the united counties.

The certificate is no doubt irregular and incorrect in describing Mr. Ruttan as the sheriff of the united counties as of the year 1840, for although he was sheriff there were then no such bailiwicks in the Province; and it is equally objectionable in so describing him, if the time of its execution is to be referred to a time when he was not in office,

for although there were then united counties he was not the sheriff of them.

If a former sheriff were required to complete the execution of process he had begun, he might be ruled to return the writ, or be forced on by a writ of *distringas nuper vicecomitem*. The writ would not go to him, but to the new sheriff against him, describing him as lately sheriff.

If this description had been in the conveyance to the purchaser it might have been fatal under the Registry Act, according to *Reid v. Whitehead*, 10 Grant 446, and *Robson v. Waddell*, 24 U. C. R. 574.

The case of *Magrath v. Todd*, 26 U. C. R. 87, decided that an affidavit of the execution of a certificate for the discharge of a mortgage, which did not state the place of execution as required by the Statute, was not invalid if the registrar accepted it, and registered it, though possibly he could not have been required to accept such a document; that the objection would not appear in the entry of the discharge in the register book, and that a purchaser would not be required, in looking for the discharge of the mortgage, to examine the affidavit of the execution of the discharge. By the 23rd section of that Act, the place of such execution was expressly required to be sworn to.

Here the certificate might have been quite sufficient if it had merely commenced, "I, Henry Ruttan, of Cobourg Esquire, or had added, "lately Sheriff of the United Counties," &c. But although it is "I, Henry Ruttan, Sheriff of the United Counties," &c., and is dated the 10th July, 1840, I do not think it is utterly bad.

The registrar might not have been required to receive it because he might have said, "I am to get a certificate under the hand and seal of office of the sheriff. Mr. Ruttan must therefore describe himself as sheriff; or if he can give the certificate, although no longer sheriff, let him describe himself as formerly sheriff, otherwise I shall not receive it."

This certificate is not to be entered in any book, or registered. It is to answer as a mere check or index of

such conveyances as may be brought for the registrar to enter.

When any deed described in the certificate is produced to the registrar, and he is satisfied that it is one which is mentioned in it, he is to "record a transcript of the conveyance," and that "shall be deemed to be a sufficient registry thereof."

In my opinion this was a sufficiently formal instrument to be acted upon by the registrar, and as it was acted on, and a registration made by virtue of it, the deed so registered was validly registered.

There were several other objections taken and argued :

1. That it was not shewn the land had ever been returned by the Surveyor-General as described for patent.

The fact that a book was produced at the trial, dated the 24th of June, 1820, signed by Mr. Ridout, Surveyor-General, containing a list of grantees, and the lots granted, and the number of acres in each lot, and that the lot was found in it, with the name of Elizabeth Hay opposite it, with the letter D opposite her name, was sufficient evidence of the return having been made, although there was no heading to the book describing in so many words what the subject and object of the book were. There was also the additional fact that the same lot was granted to Elizabeth Hay in the year 1817. This was not the case of a contract attempted to be proved, when there was no explanation as to what a mere subscription list referred to was, as in *Boydell v. Drummond*, 11 East, 142.

2. That there was no evidence of the taxes having ever been properly imposed by the Quarter Sessions, under the 59 Geo. III. ch. 7, and later Statutes.

3. That there was no evidence of the sheriff's advertisements of the sale, excepting two printed slips which were cut from a newspaper, and which were pasted in the cover of the sheriff's sale books of land sold at the sale. There was no evidence given explaining what these slips were, or where they came from.

It was contended that these objections were not cured by

the Ontario Act, 32 Vic. ch. 36, sec. 155, and that the case of *Hamilton v. Eggleton*, 22 C. P. 536, shewed that if there were no taxes due, the sale notwithstanding that statute would be void.

The first of these objections has been already answered.

The second and third are, we think, covered by the recent legislation.

There is another point, however, still to be considered. The 29-30 Vic. ch. 53, sec. 156, enacted that whenever lands shall have been or may be hereafter sold for arrears of taxes, and a deed shall have been given for the same, the deed shall be valid except as against the Crown, if it has not been questioned before a Court of competent jurisdiction by some person interested in the land so sold, within four years after that Act, when the deed was given before the Act, or within four years after the giving of the deed when it is given after the passing of the Act.

The Ontario Act, 32 Vic. ch. 36, sec. 155, reduces the four years before mentioned to two years after the last Act, or to two years after the sale and deed if they have been made after the Act.

There is no reason to doubt that the land was actually though perhaps not formally taxed, and the deed has never been questioned that we know of until lately.

The facts of taxation and sale were as follows:—The clerk of the peace, on the 12th July, 1837, certified to the Quarter Sessions that there was a sum of £3 5s. due on the lot for eight years, ending on the 1st of July, 1837. The chairman made an order that a warrant for sale should issue. And the warrant was issued on the 13th day of the same July against this land and other lands, and the land was duly sold. Seventeen acres of the lot were again sold for arrears of taxes to one Robert Crawford, and redeemed by Archibald Fraser in November, 1855. The whole lot was again sold for taxes to William Fraser in 1865, and redeemed by George E. Jones, from whom the plaintiff claims. In 1871 the lot was again about to be sold for taxes, when the plaintiff paid the amount.

There having been a sufficiently formal sale, and there having been an actual sale for taxes certainly imposed upon the land, and at the time of the sale in arrear and unpaid, and a deed having been given in 1840, and the same person who bought at that sale or those under him having paid the taxes from that day to this, and the deed not having been questioned before any court by any person interested in the land, within either four years or two years from the giving of the deed, the purchaser and those claiming under him are entitled to hold the land against any objections relating to the assessment or sale of the land.

The 2nd section of the 33 Vic. ch. 23, O., is also expressly in favour of the plaintiff, for possession was not taken under the deed, and the tax purchaser and those claiming under him have paid prior to the 1st of November, 1869, "at least eight years taxes charged on the lands," and the former owner had not occupied the land or any part thereof for one year between the sale by the sheriff and the 1st of November, 1869.

In every way of considering this case I think the plaintiff is entitled to the land, excepting as her title is affected by the non-registration of the deed of 1840. In my opinion, according to the construction to be given to the statutes on that subject, the sheriff's deed was required to be registered to preserve its priority, although the title was not at the time a registered title.

This conclusion, I think, is not easily to be reconciled with the decision in *Burnham v. Daly*, 11 U. C. R. 211. But I am not able to form any other opinion than the one I have expressed.

I am also of opinion that the registration of 1861 was not a valid registration against the prior one under which the defendants claim in 1855. But if there had been no such registration in 1855, the registration of 1861 might, if it had been necessary so to consider it, be considered either as a valid registration independently of the statute, or a valid registration under the statute.

And that when the Acts of 1865 and 1868 were passed, which enabled the plaintiff's deed from the sheriff to be registered *under and by virtue of these Acts*, it was necessary the plaintiff's deed, not having efficacy independently of these acts as against the defendant's prior registration, should have been registered *under the statutes*, in order to give it the full statutory effect against such prior registration which before prevailed against it. But the plaintiff's deed, not having been so registered under the statutes, can derive no advantage *by reason of the statute*, simply because it was registered before the statute.

On the ground of non-registration, the plaintiff's case, in my opinion, fails; on all other points she is entitled to succeed.

If the plaintiff had failed in her title, she would nevertheless be entitled, under the 13th section of the 33 Vic., ch. 23, O., to have a lien on the land for the purchase money and interest thereon at the rate of ten per cent. per annum, and for the amount of all taxes paid by her or by those from whom she claims since the sale, and interest thereon at the same rate, to be enforced against the land in such proportions as regards the various owners and in such manner as the Court of Chancery thinks proper.

There would be no difficulty in making a decree or order in this case, under "The Administration of Justice Act of 1873," 36 Vic. ch. 8, sec. 8, O., if this Court has the power to do it, because William Fraser, one of the defendants, is alleged to have title to the whole lot, and the other defendant is in possession merely as the widow of James Cowden, who had a contract of purchase of the lot from William Fraser. So that a lien decreed upon the whole lot would answer the plaintiff and the defendants also, as there are not adverse or divided interests on the part of the defendants.

The order or decree would be that the plaintiff should, under the statutes in that behalf—33 Vic. ch. 23, sec. 13, O., 36 Vic. ch. 8, sec. 8, O.—have a lien on the said 190 acres of land, part of Lot No. 22 in the 1st concession of the township of Manvers, for the purchase money paid the

sheriff, with interest on it at 10 per cent. to the present time, and for the several sums since then paid by the plaintiff or those under whom she claims for taxes upon the land, with interest upon such respective payments from the time they were made to the present time; and that the matter of compensation be made by and referred to the Master of this Court to ascertain and determine the same; and judgment might be entered accordingly for the respective parties as the Court disposed of the cause.

All this, however, it is unnecessary to consider, as the learned Chief Justice and my brother Morrison are of opinion it was not incumbent on the purchaser at sheriff's sale to register his deed, the title being an unregistered title then and for many years after he got his deed; and that his registration in 1861, although after the registration of the conveyances relied on by the defendants under the heir-at-law, made it unnecessary to register under the Acts of 1865 and 1868, and was a virtual registration under or for the purposes of these acts, and has as effectually displaced the defendant's registration of 1855, if it was ever entitled to prevail against the tax purchaser, as if the purchaser had in fact registered the deed expressly under these Acts.

The rule of the plaintiff will therefore be made absolute.

MORRISON, J.—I have to differ from my brother Wilson as to the effect and operation of the statute 31 Vic., ch. 20, sec. 59, O.

The title to the land in question at the time of the sheriff's deed to the plaintiff in 1840 being an unregistered title, the sheriff's deed did not require registration to give the sheriff's vendee priority against any subsequent purchaser from the heir of the grantee of the Crown, or any person claiming through her, and consequently the plaintiff's tax title was not affected by the deed to Fraser in 1855, or by its being registered in that year.

The plaintiff registered her deed in July, 1861. Then comes the 31 Vic., ch. 20, sec. 59, O.

In my judgment, that section is a declaration of the Legislature, that all deeds for lands sold for taxes shall be registered; and the object and intention of the framers of the section were, that if such deeds were not registered at the time of the passing of the Act they should be registered within one year thereafter, otherwise parties claiming title under such deeds should lose their priority of title as against a purchaser in good faith, that is, one who purchased in ignorance of the tax title of the sheriff's vendee.

The language of the section is certainly not clear or free from ambiguity. The use of the words "shall not be deemed to have preserved their priority," necessarily implies a recognition of such deeds having a priority of title which might be lost or defeated if unregistered at the time of the passing of the Act, and so remaining unregistered for a year after.

If the plaintiff's deed had been unregistered at the time of the passing of the 31 Vic., and she had, in compliance with the section, registered it within the year, the defendant's title would not have prevailed.

That being so, I cannot see any thing in the 59th section that would lead me to think that the Legislature meant and intended that if that same deed was registered prior to the passing of the Act, it would require re-registration within the year; for any practical purpose such a proceeding would be unnecessary.

In my opinion, the object the Legislature had in view was satisfied by registration at any time prior to the statute, or before the expiration of the year limited by the section; or rather, I might say, that such a deed was not within the view or operation of the section.

There was nothing to prevent registration of the deed prior to the passing of the 31 Vic. The words "who may have acquired priority of registration," at the end of the 59th section, I take in effect to mean: Should a person claiming under a good tax title deed unregistered at the time of the passage of the 31 Vic., omit to register such

deed for a year thereafter, that in such case his unregistered deed would not prevail against a then registered deed of a purchaser in good faith.

Take the case before us. The plaintiff had a good title at the time of and after the execution of the deed to Fraser in 1855 and its registration in that year. If the plaintiff had not registered her deed prior to the date of the passing of the 31 Vic., and omitted to do so for a year after its passage, then the registered deed of the defendant in 1856 would have acquired priority of registration, and the plaintiff's previous good title would be defective; but the plaintiff having registered her deed (seven years) before the 31 Vic., as I have already expressed my opinion, retained its validity and priority against the title of the defendant.

Agreeing as I do with my learned brother on the other points in the case, I think the plaintiff is entitled to have her rule made absolute.

RICHARDS, C. J.—I do not consider the provisions of the statute of 6 Geo. IV., ch. 7, which refer to the sheriff furnishing the registrar certificates of the conveyances he has made on the sales of unoccupied land for taxes, and the power given to the registrar to register his deeds without any memorial or further proof of the execution thereof, was intended to expose purchasers of lands at such sales to the risk of having their deeds declared fraudulent and void under the registry law, if they did not register such deeds before a subsequent deed for value from the previous owner was registered, when there had not, as in this case, been any deeds whatever registered in the registry office relative to this land before the sale by the sheriff.

I think the statute provided the means, a cheap and expeditious one, of having the deeds registered, which the purchaser might use or not; and if he did not choose to register his deed, he certainly, in my judgment, was not exposed to any more risk than hundreds of the proprietors of land who hold the titles under unregistered deeds.

When the change took place in the registry law, and the Legislature required that all deeds in relation to land should be registered, under sec. 57 of 29 Vic., ch 24, all deeds for land sold for taxes before the passing of the Act, were required to be registered within one year after the passing of that Act, otherwise the parties claiming under such sales should not be deemed to have preserved their priority against a purchaser in good faith who may have acquired priority of registration.

It seems to me that the object was to compel the parties holding under these deeds to register them, otherwise parties who claimed under prior registered deeds would cut them out.

The priority of the purchaser there referred to means priority of title, the priority of the subsequent purchaser means priority of registry. The object of the Legislature evidently being that the deeds under which the purchasers of the lands under the sale for taxes claimed should be registered, so that the registry office would show who were the owners of the land.

If this deed had been properly registered before the statute 29 Vic., it would hardly be necessary to go through with that process again.

The statute evidently means all deeds not registered at the passing of the Act. If they were registered at the passing of the Act, they certainly would literally be registered within one year after the passing of the Act, and at the time of the passing of it too.

If the object of the statute was to forfeit the property of the owner if the deed were not registered within the year, and it seems very much as if that would be the effect of the Act, it should be construed strictly.

In any reasonable view of the statute, it seems to me it would be absurd to hold that a deed that was registered should be again registered, and for no useful purpose, apparently, that can be suggested.

The remaining question then is, if the registration before the passing of the Act would be sufficient, has there been

such a registration of the deed under which the plaintiff claims? The deed itself is registered *in extenso* on the books of the register, and the proper certificate is endorsed on it.

Does the fact, that the certificate was granted by Mr. Ruttan, apparently after he ceased to be sheriff of the Newcastle district, on which it is probable the deed was registered, make it necessary to re-register the deed to preserve the rights of the purchaser under the sheriff's deed?

I concur in the view taken on this point by my learned brother Wilson, and think that the alleged irregularities in relation to the certificate ought not to induce us to view this as an unregistered deed.

I also concur with my brother Wilson that the other alleged irregularities as to the sale are cured by the statutes; and, in the view which I take, the plaintiff is entitled to recover.

Rule absolute.

MARGARET McDONALD V. RONALD McDONALD.

Will, Construction of—Devise to wife and family.

A. McD., in 1864, describing himself as of the north half of lot twenty-seven, fifth concession of Nottawasaga, bequeathed "the above-mentioned property in the following manner to my wife (the plaintiff) and family." The will then authorized the executors to cause the proceeds of the said property to be used for the support and keeping of his wife and family for a term of twenty years, and directed them to pay his debts, but did not devise the property to them. The will further directed that, after the said term of twenty years, his son Ronald (the defendant), was to have the south part of the above land, which he was to pay for, and the remainder was devised to another son, who was directed to pay legacies to his sisters. Subsequently Ronald obtained a patent from the Crown of the land devised to him, *habendum*, "subject nevertheless to the terms and conditions of the last will and testament" of the testator, A. McD.

Held, that the words, "I bequeath," &c., "*in the following manner*," &c., "to my wife and family," carried the estate direct to them, notwithstanding the direction to the executors.

Held, also, that the defendant holding the legal estate under the patent, and having a beneficial interest in his own right as one of the family, the plaintiff could not maintain ejectment against him.

EJECTMENT for the south half of the north half of lot number twenty-seven, in the fifth concession of Nottawasaga.

The plaintiff claimed title under the will of Alexander McDonald, dated the 5th of April, 1864. She was his widow, he having died nine years before this action.

The defendant denied the plaintiff's title, and asserted title in himself by letters patent from the Crown, dated the 2nd of July, 1872.

The defendant, Ronald McDonald, was a son of the testator and a step-son of the plaintiff. He had not been living with his father for a year before his father's death. The testator left five children by the plaintiff, all infants.

The will was as follows:—

"I, Alexander McDonald, of north half of lot No. 27, fifth concession of the township of Nottawasaga, county of Simcoe, yeoman, although weak in body but sound in mind, bequeath the above-mentioned property in the following manner to my wife and family. And I authorize

the executors of this my last will, viz., John Sinclair, Andrew Mowat, and Duncan Patterson, to cause the proceeds of the above property for the support and keeping of my wife and family for a term of twenty years from this date, and that they will also pay all my lawful debts at the earliest opportunity. After the above-mentioned term of twenty years my oldest son Ronald will have the south half of the above-mentioned north half of lot No. 27, and that he, Ronald, will pay for said half. I leave the north half to my son Donald at the expiration of aforesaid term, and that Donald, when in possession, will pay to my son Allan one hundred dollars of lawful money of Canada; and to my daughter Marion fifty dollars of lawful money of Canada; to Lilly, fifty dollars do., do., do. (meaning, of lawful money of Canada). And my oldest son Ronald will give fifty dollars to my daughter Margaret, and fifty dollars to Jessie, and fifty dollars to Mary, when in possession of the place. I now place all confidence and trust in these, the executors that I have nominated and appointed to my last will and testament, John Sinclair, Andrew Mowat, and Duncan Patterson; and hereby revoking all other wills and testaments by me at any time heretofore made, I declare this to be my last will and testament. In witness whereof, I, the said Alexander McDonald, have to this my last will and testament set my hand and seal this fifth day of April, in the year of our Lord, one thousand eight hundred and sixty-four.

“Testator, { ALEXANDER ^{His} × McDONALD.
Mark.

“Witnesses, { ALLAN McDONALD.
DONALD PATERSON.”

The only important part of the patent under which defendant claimed was the habendum, which was:—

“To have and to hold the said parcel or tract of land hereby granted, conveyed and assured unto the said Ronald McDonald, his heirs and assigns for ever, subject nevertheless to the terms and conditions of the last will and testament of Alexander McDonald, deceased, bearing

date on the fifth day of April, in the year of our Lord, one thousand eight hundred and sixty-four.

The cause was tried at Barrie, at the Spring Assizes of 1873, before Hagarty, C. J., C. P., without a jury; and a verdict was entered for the defendant.

In Easter Term, 1873, *Harrison*, Q. C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside and a verdict be entered for the plaintiff, pursuant to leave reserved and to the Law Reform Amendment Act.

In this term, *McCarthy*, Q. C., shewed cause. The defendant, under the patent, has the legal title. The words of the *habendum* clearly shew that; and the verdict is therefore right.

Harrison, Q. C., supported the rule. Under the will there is such a use to the wife as under the Statute of uses vests the legal estate in the wife. Secondly, we are, under the Administration of Justice Act, entitled to succeed if we have an equitable estate. He cited *Campbell v. Campbell*, 6 Grant 600 (a); *Hayes* on Conveyancing, 5th Ed. 32-48.

WILSON, J., delivered the judgment of the Court.

The contention is what the legal rights of the plaintiff and defendant are, so far as the possession or right to the possession of the south half of the north half of the lot is concerned.

The will should be read as follows: "I bequeath the above property, the north half of lot number 27, *in the following manner* to my wife and family: I authorize the executors to cause the proceeds of the above [to be applied] for the support of my wife and family, for a term of twenty years from this date; and also to pay all my lawful debts at the earliest opportunity. After the above-mentioned term of twenty years, my oldest son, Ronald, will have the south half of the north half, and he, Ronald, will pay for the said half. My oldest son, Ronald, will give \$50 to Margaret, \$50 to Jessie, and \$50 to Mary, when in possession of the place."

(a) See also *Fulton v. Cummings*, in appeal, ante p. 331.

The like provision is made as to the north fifty acres, as follows: "I leave the north half to my son Donald at the expiration of aforesaid term, and that Donald, when in possession, will pay to my son Allan \$100, &c."

The will has devised the land to his wife and family *in the following manner*: that is to say, that the executors are to cause the proceeds of the property to be applied for the support of keeping the testator's wife and family for twenty years.

The *family* means the children, and the children in 1864, the date of the will, were the heirs at law; so that there is no nicety in deciding, as there was under the law before 1851, whether the word family meant the heir-at-law or the children.

The widow and children are thus to receive the proceeds of the land for twenty years; the executors are to cause the proceeds to be applied for their support.

There is, however, no devise to the executors of the land. If there had been, and they were to cause the proceeds to be applied for the support and keeping of the wife and family, they would have had an active duty to perform, and they would have taken the legal estate, because it would have been necessary they should have done so in order to have enabled them to cause the proceeds to be applied for the support and keeping of the wife and family: *Sylvester d. Law v. Wilson*, 2 T. R. 444; *Doe Shelley v. Edlin*, 4 A. & E. 582; *Barker v. Greenwood*, 4 M. & W. 421; *Williams v. Waters*, 14 M. & W. 166.

The testator not having given an estate to the executors for the purpose described, must be held to have given it to the wife and family themselves, and the words, *in the following manner*, must be held as meaning for the length of time and for the purpose thereafter stated.

If it had not been for the words, "I bequeath the property in the following manner: *to my wife and family*," it might have been held, the devise being to the two sons after the twenty years had expired, and the two sons being two of the heirs-at-law of the testator, that the executors took an estate for the purposes of the will during

the twenty years, on the principle that a devise to the heir-at-law after the death of A., gives by implication an estate for life to A.; for if it did not, the heir-at-law would take at once, while it was apparent he was not to have the land till after the death of A., and, of necessity, the only person who could take it in the meantime was A., himself.

But I think the bequest of the property to the wife and family carried the estate to them direct.

In what way the executors are to cause the proceeds to be applied for the benefit of the wife and family does not appear; but the purpose of the testator does not fail because the person by whom he intended it to be effected cannot accomplish it.

The wife and family may do directly that which might equally have been and perhaps was intended to have been done by the executors.

The wife and family having the land under the will for twenty years, the defendant will take it at the expiration of that time.

In the meantime, the defendant has got in the legal estate by grant from the Crown. He is one of the family, and, as such, has a legal interest in his own right by the will during the twenty years.

The patent has conferred the legal estate in the fifty acres in question on the defendant. He has the land subject to the terms and conditions of the will, that is, in trust for the persons named in the will: *Ellcock v. Mapp*, 3 H. L. Cas. 492; *Clarke v. Hilton*, L. R. 2 Eq. 810.

A verdict for the defendant will permit the parties to remain just as they were before the action.

The wife and family are entitled to the beneficial occupation of the land. This Court cannot perhaps award it to them or to the wife as one of the parties, but if she is in possession this Court can protect her in it under the late statute, by reason of any equitable defence she might then plead.

In our opinion, the rule must be discharged.

Rule discharged.

STRACHAN V. BARTON.

Demurrer—Defamation—Plea to words charged, without the meaning.

DECLARATION: That the plaintiff voted at a certain parliamentary election, and took the oath prescribed by section 41, of the Election Law of 1868, and that in reference to such oath, defendant falsely and maliciously spoke, &c., of the plaintiff, the words: "He swore to what was false, and I can prove it," meaning that the plaintiff was guilty of wilful and corrupt perjury.

Plea, to so much of the declaration as related to the speaking of the alleged words without the alleged meaning, that the plaintiff did swear false in swearing that he was a resident of a certain electoral division, and as such entitled to vote, &c.

Held, on demurrer plea bad, because if it intended to specify perjury, it should have distinctly charged that offence, and if not, the general issue should have been pleaded.

DEMURRER. Declaration: For that, at an election to serve in the Legislative Assembly of the Province of Ontario for the South Riding of the County of Ontario, the plaintiff was a voter, and voted, and on the occasion of his so voting the deputy returning officer administered to him and he took the oath authorized and required by the 41st section of the Election Laws of 1868; and the defendant, speaking of the taking of the said oath by the plaintiff on the said occasion, falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "He swore to what was false, and I can prove it;" the defendant thereby meaning that the plaintiff had been guilty of wilful and corrupt perjury.

2nd Plea. As to so much of the declaration as relates to the speaking and publishing by the defendant of the alleged words, without the alleged meaning, that before the alleged grievances the plaintiff, in taking the oath referred to in the plaintiff's declaration, did swear to what was false, in this: in swearing that he was at the time such oath was administered to him, and when he took the said oath, a resident of the electoral division of the South Riding of the County of Ontario, and, as such, entitled to vote at said election for the election of members to serve for such riding in the Legislative Assembly for the Province of Ontario.

Demurrer, on the grounds, 1, that the said plea answers

only a matter which is not the slander complained of; 2, that the said plea is no answer to the declaration.

Joinder.

During Michaelmas Term, 1873, the demurrer was argued. *C. S. Patterson*, Q. C., for the demurrer. The plea in no way answers the declaration. If it is not intended to support the charge of perjury, "Not Guilty," is the proper plea.

M. C. Cameron, contra. The plea may be embarrassing, but it is not bad, and the proper remedy was to have moved to strike it out in Chambers: B. & L., Prec., 3rd ed., 725; *Tench v. G. W. R.*, 29 U. C. R. 319; *Bremridge v. Latimer*, 12 W. R. 878. There is no reference to residence in the section referring to the oath: 32 Vict. ch. 21, sec. 5. In the schedule to it the reference first appears. It may be doubted whether 32-33 Vic. ch. 23 D., establishing what is perjury, applies to this case.

C. S. Patterson, Q. C., in reply, cited *Watkin v. Hall*, L. R. 3 Q. B. 402; *Forbes v. McClelland*, 4 P. R. 272.

RICHARDS, C. J., delivered the judgment of the Court.

The allegation in the plaintiff's declaration that defendant stated, in reference to the oath he took before the deputy returning officer, "He swore false, and I can prove it," thereby meaning that the plaintiff had been guilty of wilful and corrupt perjury, shews, of course, *prima facie* a charge of a crime.

If the words themselves are actionable without the innuendo, the plaintiff may recover without the precise meaning given by the innuendo being proven.

This seems to be the view of the Court of Queen's Bench in *Watkin v. Hall*, L. R. 3 Q. B. 402.

If the words are actionable, they are only so because they charge perjury, and if the defendant wishes to justify that, he should say that the defendant did commit perjury. If they do not charge perjury, or defendant did not intend to charge perjury, then under the plea of the general issue the question can be raised.

The defendant's counsel admits the plea is embarrassing, and the plaintiff might have applied to the Court to strike it out.

The distinction between an embarrassing and bad plea is very narrow. I think the effect of the decisions in the cases referred to, particularly of *Forbes v. McClelland*, 4 P. R. 272, 274, is that the plea is bad.

Judgment for plaintiff on demurrer.

M'CANN v. THE WATERLOO COUNTY MUTUAL FIRE
INSURANCE COMPANY.

Fire Insurance—Notice of mortgage posted, but not received.

To an action on a fire policy, the defendants set up a condition endorsed on the policy, that any subsequent mortgage of the property insured "must be notified to the secretary in writing forthwith, otherwise the policy shall be void." The plaintiff mortgaged part of the property insured to one McC., who mailed a letter to defendant's secretary, notifying him, as required by the condition, but the letter did not reach him.

Held, that the mere posting, without shewing that it reached the secretary, was not a compliance with the condition.

THIS was a case tried before GWYNNE, J., at the last spring assizes, held at Milton.

The action was brought to recover losses under two fire policies, made by the defendants upon certain machinery owned by the plaintiff.

The policies were dated, respectively, 13th May, 1871, and 30th September, 1871, and were set out in the first and second counts.

The defendants pleaded, *inter alia*, to the first count, as their fourth plea: "That the policy on that count was subject to a condition endorsed on the policy, "That any mortgage of the property insured, or of the lands on which it stands, or of any lands attached thereto, made subsequently to the insurance, must be notified to the secretary, in writing forthwith, otherwise the policy shall be void," &c. The

plea then alleged that after the making of the said policy, and before the alleged damage and loss, to wit, on the 7th of May, 1872, the plaintiff, by indenture of bargain and sale, &c., conveyed and transferred the movable machinery, consisting of one spinning jack, &c., the premises in the first count mentioned, by way of mortgage, to one Duncan McGibbon, &c.: that the secretary of the defendants was not, at the time of the execution of the said mortgage, nor at any time before or after the making of the same, notified in writing of the existence of the said mortgage, nor was any notice whatever of the said mortgage ever given to the defendants by the plaintiff, or any one on his behalf, &c. And the defendants say, the said condition has been broken, and the policy, &c., forfeited, and become null and void. To the second count, the eighth plea, a similar plea was pleaded.

The plaintiff took issue on these pleas, and upon these issues the main questions at the trial arose.

It appeared that after the policies were effected, the plaintiff gave a mortgage to Duncan McGibbon, upon the machinery insured, dated the 7th May, 1872: that on the 11th May, McGibbon, at the instance of the plaintiff, wrote the following letter:

"Milton, 11th May, 1872.

C. M. TAYLOR, ESQ.,

Sec'y Waterloo Co. Mutual Fire Ins. Co., Waterloo.
Re policies Nos. 656 and 760.

Dear Sir,—Mr. Logan McCann has mortgaged part of the property contained in these policies, to the extent of about \$90. I am the mortgagee. I hereby give you notice that the above property has been mortgaged to the extent above mentioned.

Yours, truly, D. MCGIBBON."

McGibbon was examined as a witness, and he stated that he mailed the above letter, on the day of its date; that he addressed it as he did other letters, to Mr. Taylor, as secretary of the company, to which he received answers; he said the letter did not appear to have had the word "Ontario" on it.

At the close of the plaintiff's case, defendants' counsel moved for a nonsuit, on the ground that no notice of the mortgage of the 7th May was given as required by condition No. 4, indorsed on the policy, and that the mortgage being executed divested the plaintiff of property sufficient to maintain the action.

The learned Judge over-ruled the objections.

For the defence, *Mr. Taylor*, the secretary of the company, was called, who testified that he never received a letter such as that spoken of by *Mr. McGibbon*; that there is a Waterloo Village near Kingston, and one in Quebec, and that letters intended for him had gone astray, to the Waterloo near Kingston; that he was not aware until after the fire that the property was mortgaged, or that any officer of the company was aware of it: that he did not think it possible the letter could have been received; that he did not think he received letters from *McGibbon* before the fire; he said that there was, at one time, a post-office at the Waterloo near Kingston.

The learned Judge, in his charge to the jury, said that the plaintiff ought to succeed on these issues, if the letter in question was addressed and mailed, as stated by the witness *McGibbon*; and he asked the jury to say, when giving their verdict, whether the plaintiff had caused the letter to be sent; whether it was in fact mailed as *Mr. McGibbon* had sworn; and whether, if so mailed, it came to the office of the company.

The defendant's counsel objected to the learned Judge so leaving the question of notice to the jury, submitting that it was a material part of the issue that the notice was given forthwith, and that the learned Judge should have charged that it was not so given. He, also, renewed his objections taken at the close of the plaintiff's case, and urged that the jury should have been told that it should have been proved that the notice was received by the company.

The jury found for the plaintiff \$1,000, and they said they were of opinion that due notice of the mortgage was mailed, as sworn to by *Mr. McGibbon*, and that the notice

as mailed went to the post-office, at the place of business of the company.

The 18th condition of the policy provided that "The policy of insurance shall be deemed cancelled * * after a notice from the Secretary to the insured informing him that the policy is cancelled has been deposited in Her Majesty's post office at Waterloo, Ont., addressed to the proper post office address of the insured," &c.

During last Easter term, *Bethune* obtained a rule *nisi* for a new trial, on the ground that under the fourth condition indorsed on the policies they were void, because the mortgage in question was not notified to the secretary in writing, and the defendants were never notified thereof; and because the learned Judge refused to direct the jury that the plaintiff, to comply with the condition, was bound to prove that the notice in writing was sent, and sent forthwith, and that it was received by the secretary of the company. And he also asked, if necessary, that the defendants should have leave to amend their pleas, by alleging that the plaintiff did not notify the secretary forthwith, after the execution of the mortgage.

During this term, *M. C. Cameron*, Q.C., shewed cause. The notice is sufficient. The defendants have recognized this mode of notice in their 18th condition. A notice to quit is sufficiently served if put in the post: *Papillon v. Brunton*, 5 H. & N. 518. In this case Pollock, C. B., said at p. 521: "The defendant said he posted a letter containing the notice between nine and ten o'clock on the morning of the 25th of March. The agent of the landlord said that he was at his chambers until seven o'clock on the evening of that day, and he did not receive the letter, but he found it the next morning when he went there. The jury found that the letter arrived on the 25th, after the agent had left. * * We think that in the case of a notice to quit the putting it into the post-office is sufficient, and that the party sending it is not responsible for its miscarriage." The mortgage for \$90 only on a policy of \$1,000 is so unim-

portant that the Court should lean as far as possible to the plaintiff.

Bethune, contra. The Court should give full effect to the condition. This case comes short of *Papillon v. Brunton*, 5 H. & N. 518, there the notice reached the party; here, the jury found it did not. See also *Constantinople and Alexandria Hotels' Co., Finucane's case*, 17 W. R.; *Constantinople and Alexandria Hotels' Co., Reid-path's case*, 40 L. J. Chy. 37; *Hodgkins v. Montgomery County Mutual Insurance Co.*, 34 Barb. 213.

M. C. Cameron, Q. C., in reply, cited *Re Imperial Land Co. of Marseilles*, *Wall's case*, L. R. 15 Eq. 18 (a).

MORRISON, J., delivered the judgment of the Court.

The condition upon which this company rests their defence, and which they say has not been complied with, is as follows:

"Any mortgage of the property insured," &c., "made subsequently to the insurance, must be notified to the secretary in writing forthwith, otherwise the policy will be void."

Disinclined as I am to give effect to so technical a defence as is here set up, if the question was one of ambiguity of expression in the condition, and capable of a construction in favor of the plaintiff, I certainly would lean to such a construction to defeat so unmeritorious a defence; but in the case before us, I regret I cannot see any way, or find any authority for deciding that the plaintiff is entitled to our judgment.

It is clear that a mortgage was made, although for a small amount, on the property insured on the 7th May, 1872, (both policies being effected in 1871,) and a notice of the mortgage being effected was mailed on the 11th May, 1872, addressed to the secretary of the company.

That notice was sent by the mortgagee, at the instance of the plaintiff, notifying the secretary that the mortgage in question was upon the property insured contained in the two policies, referring to them by their numbers.

(a) See *Imperial Land Co. of Marseilles*, *Harris' case*, L. R. 7 Ch. App. 589.

It did not appear that the letter was otherwise addressed than to Waterloo, omitting Ontario, or Ont., as indicating Waterloo in this province; and as it appears there is, and which is readily seen by referring to a list of the post-offices, a Waterloo in Quebec, as well as a Waterloo in Ontario, both being post-offices, and, from the evidence, it appears that there is a Waterloo near Kingston, in this province, also. The suggestion is, that from the omission of Ontario on the address of the letter, it went astray.

It was contended for the plaintiff that putting the notice in the post-office in Milton, addressed, as this letter was, to the secretary, was a compliance with the terms of the condition, and several cases were referred to.

In the case of the *British and American Telegraph Company v. Colson*, L. R. 6, Ex. 108—a well considered case, and where all the cases are reviewed—the question of the effect of posting a letter was discussed at length.

Kelly, C. B., in giving judgment referring to the case of *Dunlop v. Higgins*, 1 H. L. C. 381, which was there relied on for the plaintiffs, says at p. 112: "It will be found that this case is no authority at all for the proposition contended for by the plaintiffs, that the putting a letter into the post accepting a contract is equivalent to the delivery of the letter to the person written to, and binds him by the acceptance although it should never be delivered."

And the Chief Baron, in his judgment, at p. 111, also points out that "The consequences, if the law were as contended for on the part of the plaintiffs, would be such as to work great and obvious injustice, in a variety of mercantile transactions of constant occurrence." And he says, "It is absolutely impossible that such can be the law of the country."

Bramwell B., in a long judgment, reviews all the cases, *pro* and *con*. He says, at p. 117: "Both agree that if the plaintiffs had not availed themselves of the post, but had sent their letter by hand, and the messenger had not delivered it, there would be no acceptance of the defendant's offer. But the plaintiffs say it is different in the case of the public post. Why it should be, no reason is given. If

it is in this case, it must be because it is so as a general rule. To hold, therefore, that the plaintiffs are right, it seems to me that we must lay it down as a general proposition that in cases where the post may be used, whenever a person posts a letter, he does that which is equivalent to delivering it to the person to whom it is directed."

The learned Baron, after quoting several cases to shew the unreasonableness of such a rule, proceeds on p. 118: "When these considerations are borne in mind, when it is remembered that it is open to the sender to adopt other means of sending, when it is certain if he does he is responsible for the due arrival of the letter, it seems to me right to hold that as a rule the post is the agent of the sender of a letter, and that the delivery of a letter to the post, not followed by delivery by the post to the person to whom it is sent, is no delivery to the latter, and has no more effect than if the letter had been given to a hand messenger and not delivered, or had been kept in the pocket of the sender. In the absence of authority, therefore, I should hold, and confidently hold, that in this case the defendant's offer had not been accepted, and that he was not liable. Of course if the person addressed had agreed that posting a letter should suffice like a delivery of goods to a carrier, he would be bound. But it seems to me that when nothing more appears than that the post may be resorted to, the mere posting should not bind the person written to; because in all cases, unless the contrary appears by express stipulation, the post may be resorted to. If it should be argued that convenience requires such a rule, as otherwise persons might untruly deny the receipt of letters, the answer is, that if such a rule, prevailed persons would untruly assert the posting of them."

I have carefully read *Re Imperial Land Co. of Marseilles*, Wall's case, L. R. 15 Eq. 18, referred to by Mr. Cameron, heard before Vice-Chancellor Malins. In that case the learned Vice-Chancellor was of opinion that the posted letter in that case was duly received by Wall. *Colson's* case, above cited, being relied on during

the argument, the Vice-Chancellor, referring to his having said, in a previous case—“*Townsend's case*,” L. R. 13 Eq. 148,—that by *Colson's case* the law “seems to be settled, and not unreasonably,” says, in *Wall's case*, at p. 25, “Upon further consideration, I do not think it is so reasonably settled,” and he proceeds to give his reasons for so thinking, which, in my judgment, are no reasons against the general rule laid down in *Colson's case*.

As Bramwell, B., says, in his judgment, if the condition in question contained a stipulation such as is to be found in the 18th condition of these policies, then the depositing of a letter in the post-office, addressed to the proper post-office of the defendants, would have been sufficient.

I may here remark that that condition was referred to by the plaintiff's counsel, as indicating that the defendants recognized that mode of notifying them, but that condition is specially restricted to the cancellation of a policy by the defendants, and, for obvious reasons, an insurance company have to deal with a large number of insurers, living at distant points, and subject to change of residence, and so inconvenient and uncertain for the service of a notice, if necessary.

I have looked into several American cases, but I find that the decisions of the United States Courts construe the policies strictly, and in a sense adverse to the plaintiff.

As to the finding of the jury, it stops short of the main fact, the delivering to or receipt of the letter by the secretary, viz., that it only arrived at the post-office in Waterloo, and we have no doubt the jury found so, believing the testimony of the secretary, that he did not receive it, was not aware of it until after the fire, and did not think it possible it could have been received.

On the whole, we are of opinion that, as the condition contains a positive requisition that the making of such a mortgage must be notified—that is, made known—to the secretary in writing forthwith, otherwise the policy will be void, that it can only be met, or complied with, by an actual delivery to the secretary of such notification: and this the plaintiff has failed to establish.

Rule absolute for a new trial.

McCulloch v. The Gore District Mutual Fire Insurance Co.

Fire insurance—Contradicting witness—Collateral issue—New trial.

Action on a fire policy. Plaintiff was called as a witness, and said: "I did not tell E., defendants' agent, I had not been burned out before. I was not asked by him." E. was called, and it was proposed to ask him questions to contradict the plaintiff on this point.

Held, that such evidence was properly rejected, as raising a collateral issue. The case having been four times tried, the plaintiff having succeeded twice, and the jury having disagreed on the other occasions, and the defence being in the nature of a charge of arson, a new trial was refused.

THE pleadings in this case are stated in 32 U. C. R. 610.

A new trial having been ordered, the case was taken down to trial at the Spring Assizes of 1873, held at Cobourg before *S. Richards*, Q.C.

The plaintiff was called as a witness, and on cross-examination said, "I did not tell Evatt, defendants' agent, I had not been burned out before, I was not asked by him."

The defendants called Mr. *Evatt*, and towards the close of the evidence, the defendants' counsel proposed to ask him, if he had not asked the plaintiff, at the time the application was made for insurance, whether he had been burned out before or not, and also whether the plaintiff told him he had not been burned out before. The plaintiff's counsel objected to the question, and the learned Queen's Counsel refused to allow it to be put.

The plaintiff on his cross-examination said, "In the spring and fall of 1869-70 I bought goods of Heath & Co., and another firm of New York of the amount of about \$270, the invoice, I think, was burned. I brought them in by the Suspension Bridge; I did not pay duties; I was not asked for any; I thought as the goods were my own I was not required to pay duty. I paid cash for them."

A verdict was rendered for the plaintiff for \$872.

In Easter Term *Robertson*, Q. C., obtained a rule *nisi* for a new trial on the following grounds:—

1. For rejection of the evidence offered to contradict the statement of the plaintiff that the agent of the Company

had not enquired of him whether he, the plaintiff, had previous to the application for this insurance ever suffered loss by fire.

2. That the verdict was against evidence, unwarrantable and perverse, the evidence leading to the irresistible conclusion that the plaintiff had not in the premises which were destroyed by fire at the time of the fire, and did not lose thereby, more than one-fifth of the value of the goods which he claimed to have lost by the fire.

3. That the verdict was contrary to law and the Judge's charge, the defendants having established their second plea which entitled them to a verdict on the said issue (a).

4. On the grounds disclosed in affidavits filed, shewing that it is not true, as sworn by the plaintiff at the trial, that he had imported from the United States of America by way of Suspension Bridge and Niagara, large quantities of drugs and medicines during the period between the 1st day of March, 1867, and the year 1870.

On obtaining the rule the defendants filed the affidavit of William Leggitt, who had been collector of customs at Clifton since December, 1857, to the effect, that no person of the name of John Robert McCulloch, or any person on his behalf, entered drugs or medicines at the said port between the 1st of March, 1865, and the 1st March, 1870: that he had made diligent search in the books and finds no such entry: that between the times aforesaid drugs brought from the United States were subject to a duty of not less than 15 per cent.; that if drugs of the value of \$10 or upwards, during that period had been brought into or passed through the port of Clifton for private use or otherwise, such medicines would have been entered and duty exacted thereon; that entry is required of all goods, whether free or dutiable; and that no entry of drugs or any kind of drugs was made by John Robert McCulloch, or by any person on his behalf, between the dates before mentioned, at the port of Clifton.

(a) The second plea was, that the statement of loss sworn to by plaintiff was false and fraudulent, in this, that the value of the goods destroyed was much less than the sum alleged.

A similar affidavit was filed made by William Kirby, of the town of Niagara, collector of customs.

During this term *C. Robinson*, Q.C., and *Patterson*, Q.C., shewed cause and filed an affidavit of the plaintiff. The plaintiff's affidavit fully answers the affidavits of the collectors of Clifton and Niagara. The plaintiff did not pretend he had made any entry at those places. He says in his affidavit he brought the medicines referred to packed in trunks and boxes with other effects brought with him at the time, and that he explained to the persons who examined his luggage that he was bringing the drugs as his old stock, and for use of himself in his practice, and he was not required to make any entry at the custom house, and all his luggage, including the trunks and boxes containing the drugs in question, was passed, without any entry, as his personal luggage. The case has been taken down to trial four times, twice the jury could not agree, and there have been two verdicts for the plaintiff. The plea on which the defendants expect to obtain a verdict, in effect charges the plaintiff with perjury and fraud; and as there was evidence to sustain the verdict, the Court will not grant a third new trial on the evidence. As to the alleged rejection of evidence, the ruling of the learned Queen's Counsel was correct. It is according to the views expressed in the judgment of the Court granting the new trial, and is sustained by reason and authority. See this case already reported in 32 U. C. R. 610; *Beemer v. Kerr*, 23 U. C. R. 557; *Regina v. Brown*, 21 U. C. R. 330; *Taylor* on Ev., 6th Ed., sec. 1292, and cases there referred to; *Palmer v. Trower*, 22 L. J. Ex. 32, S. C. 8 Ex. 247. The fact that he had had claims against several other insurance companies for losses at different times before insuring with the defendants, was gone into at the trial, and the amounts paid by each company shewn.

Harrison, Q.C., and *Robertson*, Q.C., in support of the rule. The account given by plaintiff at the trial of whom he had procured the goods, drugs, and medicines that he

claimed he had lost by the fire, was not reasonable. He pretended he had brought drugs to considerable value from the United States. He stated he had brought in some by way of Port Hope; the customs officer there denied it. He says he brought in some by way of Clifton, Suspension Bridge; the custom house officer there shews that could not be the case. The verdict is not satisfactory on the facts. The former verdict was not set aside on the merits, and this is the first application for a new trial on the merits alone. The verdict is in fact rendered on the evidence of the plaintiff alone, and the other circumstances are against his statements being relied on. Courts are not inclined to be so rigid against granting new trials when a party obtains a verdict on his own evidence: *Canadian Bank of Commerce v. McMillan*, 31 U. C. R. 596; *Cuno v. Cuno*, L. R. 2 Sc. App. 300. When the Court is satisfied that injustice has been done they will grant a new trial and without costs: *Sutherland v. Black*, 10 U. C. R. 515. The witness ought to have been allowed to contradict the plaintiff as to his statement that he was not asked if he had ever suffered loss by fire previous to the application which this policy was granted: *Regina v. Burke*, 8 Cox 44; *Meagoe v. Simmons*, 3 C. & P. 75.

RICHARDS, C. J., delivered the judgment of the Court.

As to the question of rejecting the evidence to contradict the statement made by the plaintiff, as to the inquiry whether he had ever been burned out before, we see no reason to depart from the views expressed by the learned Judge who gave the judgment in this case, reported in 32 U. C. R. 610.

Referring to the question whether the question could be put to the plaintiff he said at p. 614, "In my opinion a witness could be so interrogated. And if he could, the plaintiff himself when a witness may be examined in like manner. The answers of the witness when given would be conclusive."

The matter enquired of is not pertinent to the issue, it does not relate to the question whether the plaintiff has

over-valued his goods in the claim he made against the company, and the evidence to contradict would not be given as to any matter which was being tried in the cause.

If the statement had been as to what he had said about the value of the goods, then I apprehend he could be contradicted as affecting his credibility. But a mere collateral issue cannot be raised in this way. He may be asked questions of this sort, but he cannot be contradicted as to his answer, though as to some answers he might, it is said, if false, be indicted for perjury.

I have met with no case that goes the extent of shewing that refusing to allow a witness to be contradicted on a question like this is any ground for a new trial.

As to contradicting the plaintiff's statements, this very agent of the defendants contradicted very many of the statements that were made by the plaintiff, but the jury apparently relied on the plaintiff's statements, as to the material points before them.

The affidavits of the collectors of Niagara and Clifton would not warrant us in granting a new trial. The plaintiff in his affidavit in reply does not pretend he made any entry, but that he told the officers examining his luggage that he had some medicine amongst the luggage for his private practice, and they passed it all as luggage. His evidence given on the trial as noted by the learned Queen's Counsel is not inconsistent with the affidavit now filed by him.

The verdict of two juries having been in favour of the plaintiff, and much of the important evidence given on behalf of the defendants as to the books and book-case not being in the building when it was destroyed having been met by evidence on the part of the plaintiff, and a good deal of general evidence as to value having been given by the plaintiff, we do not think, on an issue like this, almost in the nature of a criminal proceeding, that we can properly direct a new trial, which under the evidence we cannot say there is much reason for supposing would result otherwise than in another verdict for the plaintiff.

In granting the new trial my learned brother felt compelled to say at p. 615, "If the application for a new trial had depended on the evidence being sufficient to sustain the verdict we could not have interfered."

I can only repeat his statement in relation to the evidence on this latter trial.

Rule discharged.

JOHN CARRICK ET AL. V. SMITH.

Administration of Justice Act of 1873, secs 3 and 4—Ejectment—Equitable defence—36 Vic. ch. 22, O.—Lien for improvements.

Per Wilson, J., that the equitable defence in ejectment in this cause, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements made under a lease from her, fully set out below, and filed under "The Administration of Justice Act of 1873," secs. 3, and 4, though probably not affording a good equitable defence, should be allowed.

Held, that a plaintiff may reply and demur to such an equitable defence. 36 Vic. ch. 22, as to improvements on land in mistake before notice, and the lien therefor, discussed.

APPLICATION to set aside the order of the Clerk of the Crown and Pleas in Chambers.

In this term, *McMichael*, Q. C., obtained a rule calling on the defendant to shew cause why, upon reading the papers, &c., filed, the said order, allowing the statement of the defendant on equitable grounds in the cause, should not be set aside, and the statement be struck out, on the ground that the same contained no defence, and shewed no ground for equitable relief; or why the plaintiffs should not be at liberty to take issue on the statement, and to reply to it on equitable grounds, and to demur to it, the replication on equitable grounds being the substance of the replication or statement filed on the motion; and why the defendant should not be compelled to withdraw the denial of the plaintiffs' title; or why the Court should not make such order as to the cause and the trial of the issues, and as to enquiries to be made under the statute, as to the Court might seem fit.

The order of the Clerk of the Crown and Pleas, dated the 14th January, 1874, was filed on this application, and allowed the defendant, in addition to his notice denying the title of the plaintiffs and asserting title in himself, to state by way of defence on equitable grounds, facts shewing him entitled to retain possession of the premises in question, and to pray for relief in respect of the facts so stated, and to amend the record accordingly, the costs of the application to be costs of the cause, and any question regarding the costs of the day arising on account of the order to be reserved for consideration.

The equitable defence was as follows :—And for a defence on equitable grounds, the defendant states that the premises in the writ of summons mentioned were the property of one Andrew Wilson Carrick, the father of the plaintiffs: that the said A. W. C., by mortgage dated on or about the 29th of March, 1856, mortgaged the said premises to one John Smith, to secure the sum of £1,000, payable in yearly instalments of £200 each, the first whereof fell due on the 1st of April, 1857, with interest, half yearly, upon the principal sum remaining from time to time unpaid; and Margaret Ann Carrick, the wife of the said A. W. C., and mother of the plaintiff, joined in the said mortgage for the purpose of barring her dower in the said premises: that the said A. W. C. departed this life on or about the 9th of October, 1862, intestate, leaving the mortgage unpaid and in default, and leaving him surviving his said wife, who is still alive, and the plaintiffs, his children, who were then all infants of tender years, and all of whom except John Carrick, are still infants under the age of twenty-one years: that the said A. W. C. died seised of the said premises, and that subject to the mortgage the said M. A. C. was entitled to dower out of the same; and after the decease of her husband, she took and retained actual possession thereof, and paid off the mortgage; and the defendant charges that she thereupon became entitled as against the plaintiffs to hold the said premises until she should be repaid the moneys so paid by her, and interest thereon;

and that being so entitled in respect of her right to dower to have, and in fact having possession of the premises as tenant in common with the plaintiffs, she had in that respect also a lien on the premises and a right to the possession thereof until the money and interest should be repaid; and if such moneys were repaid, that she should still be entitled to possession as tenant in common with the plaintiffs in respect of her dower. And the defendant further states that the moneys and interest have not, nor have any part thereof been repaid to the said M. A. C.; that the plaintiffs had no guardian appointed by any Court, or by any formal or legal appointment, nor any other guardian than their mother as their guardian by nature and nurture; and they have always, since the death of their father, resided with and been maintained by their mother: that on or about the 9th of November, 1863, M. A. C. by indenture, let the premises to one Stephen Charlton, for a term of sixteen years from the 1st of January, 1864, at a ground rent of \$55 per annum: that the lease was for the benefit of the plaintiffs, and that since he became of the age of twenty-one years, the plaintiff, John Carrick, has ratified it by receiving rent thereunder from the defendant, and assisting his mother in the collection of the rent: that Charlton entered upon the premises under the lease, and believed they were his own for the term thereby created; and under that belief erected valuable buildings and made valuable improvements thereon, which greatly enhanced the value thereof: that on or about the 23rd of October, 1867, Charlton, with the consent of M. A. C., by indenture, assigned the term and the premises and improvements to the defendant: that the defendant believed that by virtue of the lease and assignment the premises were his own for the residue of the term, and under the belief that the premises were so his own he made further improvements thereon, and further greatly enhanced the value thereof; and the defendant charges and submits that, by force of the statute in such case made and provided, he is entitled to a lien upon the premises to the extent of the amount by which

the value thereof is enhanced by such improvement, and to retain possession thereof until his lien is satisfied; and that in case the lien shall not be satisfied within a reasonable time to be fixed by the court in that behalf, he is entitled to have the premises sold to satisfy the lien, and until such sale to retain possession thereof, and that he is also entitled to the possession under the lease from the said M. A. C., and the assignment thereof to him, by reason of the said equitable rights of the lessor. And the defendant further charges and submits that by reason of the matters herein stated, the said M. A. C. is a necessary party to the suit; and the defendant prays all such enquiries may be made and accounts taken as shall seem reasonable and just, and such rules and orders made as may be necessary fully to dispose of the rights in the matters in question.

The proposed replication on equitable grounds was: that the plaintiffs' mother did not go into possession of the lands or of any part thereof as claiming dower or any estate therein; and no part of the land was ever set apart to her for her dower, nor did she ever make any claim for dower: that the plaintiffs' mother had no power or authority to make or execute the lease; and that the same was made and executed without the plaintiffs' knowledge or consent: that the term by the lease purported to be granted extends beyond the dates respectively when the plaintiffs will attain their majority: that Charlton had, at the date of the lease, full notice and knowledge that the said lands were the lands of the plaintiffs, and that the plaintiffs were infants under the age of twenty-one years, and that the plaintiffs had no guardian; and the defendant at the time he entered into possession of the lands, also had notice and knowledge that the lands were the lands of the plaintiffs, that the plaintiffs were under the age of twenty-one years, and that they had no guardian; and that it was expressly agreed and understood by and between the defendant and the plaintiffs' mother, before the defendant went into possession of the lands, that the term purported to be granted by the lease should determine when the

eldest of the plaintiffs should attain the age of twenty-one years.

And the plaintiffs proposed to demur to defendant's plea for the following reasons:—that until dower is set apart, there is no legal title or estate in the dowress: that the voluntary payment of a mortgage by the mother or any other person gives no claim or lien on the lands as against the rightful heir: that no circumstances are stated in the plea which can give validity to the lease attempted to be set up as an answer to the action: that it does not appear that M. A. C. has ever made any charge or claim against the estate for any money which she has paid, and that in the absence of such claim by her, the defendant cannot make any such claim against the estate.

Patterson, Q. C., shewed cause. As to the appeal:—The rule which expresses the powers of the Clerk of the Crown and Pleas, gives an appeal to one of the Judges, and that course has not been adopted. This Court cannot interfere with the order until it has been so appealed and that appeal has been settled. The rule is to be found in 29 U.C.R. 623. This statement by way of equitable defence, is warranted by the Administration of Justice Act, 1873, ch. 8, sec. 4. The defendant may deny the plaintiffs' right and also plead the statement. By that Act the party cannot reply and demur generally, or to the whole plea or statement; he is permitted only to demur in part and plead in part. The wife of the mortgagor was justified in paying off the mortgage, because she was entitled to redeem it, and having done so, she is entitled to a lien upon the land until she is repaid: *Leith's Real Property Statutes*, 223; *Sheppard v. Sheppard*, 14 Grant 174; *Forrest v. Laycock*, 18 Grant 611; *Agar v. Fairfax*, 2 White & Tudor, L. C., 4th ed. 481. Dower in equity is in effect treated as a partition suit—so the dowress and the heir at law are in the nature of tenants in common for that purpose. The lease was made by the mother of the plaintiffs while she was the guardian in nurture. As to improvements, the defendant is entitled to claim for them, under 36 Vic. ch. 22, O.

McMichael, Q. C., supported the rule. The plea is embarrassing, and is setting up a right for the widow which she never set up or claimed for herself. This lease can be no more than a lease made by any other unauthorized person. The real owners cannot be bound by it, nor can they be made liable for improvements made upon the property by virtue of it.

WILSON, J., delivered the judgment of the Court.

The authorities referred to make it quite clear that the wife who bars her dower in a mortgage is entitled to redeem, and is entitled to call upon the personal estate to exonerate the realty so as to let in her claim to dower relieved from the encumbrance. *In re Betton's Trust estate*, L. R. 12 Eq. 553. Under our statute, 33 Vic. ch. 16, sec. 9, O., at any rate, this right to redeem is quite clear.

In paying off the mortgage herself, she could not therefore be considered a volunteer. If she paid it off from her own means, she would be entitled to hold the land over beyond her endowment, until she was paid the proportion above her share as dowress: *Palmer v. Danby*, 1 Eq. Cas. Ab. 219; *Fisher on Mortgages*, 2nd ed., 307.

The dowress is in the same situation as a tenant for life. The tenant for life is bound to keep down the interest only of a mortgage debt, and not the principal. The dowress would be entitled to do the same *pro tanto*. Whatever principal money is paid by the dowress or tenant for life forms a lien upon the land.

Such a payment is *primâ facie* a subsisting charge, and does not merge for the benefit of the inheritance, unless some evidence of an intention that there should be a merger can be adduced: *Faulkner v. Daniel*, 3 Hare, 199, 207, 216, 217, 218.

In *Burrell v. Earl of Egremont*, 7 Beav. 205, it is said by the Master of the Rolls, at p. 226:—"If a tenant for life pays off a charge on the inheritance, he is, *primâ facie*, entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence,

the presumption is, that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder : but evidence may shew the contrary conclusion to be true." And at p.232 he says : "A tenant for life paying off a charge upon the estate, in the same transaction merging the security by taking an assignment, connecting it with the legal estate of inheritance, *primâ facie* puts an end to the charge ; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that in paying off the charge he intended to exonerate the estate".

In that case the tenant for life thought as he was residuary legatee he was bound to pay off the charge from the personal estate, which was sufficient to do so ; but the sum was a charge upon the real estate, and not upon the personalty ; yet the payment by the tenant for life, though he took no means to preserve his lien, was held not to have been abandoned.

The obligation of a tenant for life to keep down interest on incumbrances, exists only as between him and the remainderman, and not as between him and the incumbrancers : *In re Morley, Morley v. Saunders*, L. R. 8 Eq. 594.

The facts disclosed shew that the mortgagor, the father of the plaintiff, died in 1862, and that the lease was made by the widow in November, 1863, at which time it is not probable the mortgage money had been paid off.

As between the widow as lessor and the defendant as claiming by assignment from her lessee, no doubt the widow is bound.

It is a matter of evidence whether her payment of the mortgage money, even if made with her own money, was made in entire exoneration of the estate, or was made with the intent of preserving a charge and lien upon the property for it.

The probability is, firstly, that the money with which the mortgage was discharged was not her own personal money, nor made from funds which were her own; but that the funds were the property and assets of her husband's estate, and that the moneys applied to acquit the mortgage were the proceeds or produce such funds.

The probability is, that the mother of the plaintiffs, for the benefit of herself and her family, skilfully and successfully conducted her husband's affairs so as to be able to redeem the encumbrances he had created, and to maintain herself and bring up her children, and that she never thought of making a fund for herself as distinct from that of the estate or of her children.

And the probability is, that the money so used to redeem the mortgage was an asset to be accounted for by the widow to her husband's estate. If the facts be so, then the payment made by her to the mortgagee was in exoneration of the estate, and it could not have been maintained as a charge upon the land.

If the fact be, however, that the money so applied was her own personal property, it may be a question whether she maintained or intended to maintain it as a subsisting charge upon the land for her own benefit, or intended wholly to exonerate the estate from it.

The defendant contends that as tenant of the land he has the right to determine that matter of election for her, and adversely even to her own wish, purpose, and determination, and to make this money a charge upon the land for his protection against the plaintiffs, for whose benefit and in whose favour she alone paid the money.

If the widow had been the donee of a power and made a lease, she could not afterwards, in derogation of her own grant, have executed the power to the prejudice of the lessee.

Powers have been controlled by Statute on different occasions.

By the Bankruptcy Acts, in favour of creditors, in consequence of the decision in *Thorpe v. Goodall*, 17 Ves.

388, that the assignees could not execute the power which was vested in the bankrupt.

By the 1 & 2 Vic., ch. 110, subjecting lands to an *elegit* over which the debtor has a disposing power which he may exercise for his own benefit.

By the 33 Hen. VIII., ch. 39, subjecting lands over which the Crown debtor, by bond, has a power exercisable for himself to the Crown debt: *Ellis v. Regina*, 6 Ex. 921.

In *Gilbert v. Jarvis*, 16 Grant 265, in appeal, it was held that a judgment creditor could not take means against the debtor equivalent to compelling her to exercise a power for his benefit.

This defendant cannot have the power to compel the enforcement of the widow's right, if she had such a right, or the substantiation of such a claim against the estate, for his benefit. And if the payment were made in exoneration of the estate, the widow never had a right or claim which accrued to her upon the estate, which could be enforced by herself or by any one else.

At the time she paid this mortgage she was not dowress in fact; she was entitled to dower, but she had never claimed it, nor had it been assigned to her. She had no estate in the land, but a right to have one established for her.

I do not think that a stranger, a creditor for instance, or even her lessee of the whole farm, which was her husband's, could claim that right for her. Suppose she were put to her election, as in the case of an exchange, to have her dower assigned on one estate or the other; or were put to her election as to taking a bequest or her dower: *Parker v. Sowerby*, 18 Jur. 523. A stranger cannot exercise an election: *Miller v. Green*, 8 Bing. 92, 107. And if she chose to pay this money in exoneration of the estate, why should she not do so, if it were not done in fraud.

The mortgagee may let his son-in-law, the mortgagor, live on the property without paying rent or interest, if he please: *Yeomans v. Williams*, L. R. 1 Eq. 184.

The different facts relied on by the defendant to support his equitable defence are as follows:—

First. That after the death of her husband, his widow took and retained actual possession of the property. But that possession she did not derive from her husband: *Doe d. Carter v. Barnard*, 13 Q. B. 945. It will be assumed she did not take possession as a wrong-doer, but according to the character which the equitable defence says she filled, as the guardian by nature and nurture of her children. This allegation does not help the defendant.

Secondly. That she paid off the mortgage. It is not said she did so with her own means or for her own benefit, or that she ever made any claim upon the estate in respect of it. Nor does it appear that she did pay the mortgage till long after the lease was made. From what has been said this allegation cannot be used against the plaintiffs.

Thirdly. That the widow is entitled to hold the premises as against the plaintiffs, until she is repaid the moneys which she has paid, and interest thereon. That has been also answered as before stated. The defendant has not the power to advance rights for the widow which she never had, nor pretended to have, and which, for any thing I see to the contrary, she may release at any moment to her children.

Fourthly. That even although the moneys were repaid, she would be entitled to possession as tenant in common with the plaintiffs in respect of her dower. This part of the defence fails also, because the defendant does not claim for her a personal right of occupation, but the right to let and deal with the entirety of the property as the absolute and unqualified owner of the property, and to put and retain another in possession adversely to the true owner, until her dower is assigned to her,—which estate of dower she has not claimed, and the defendant cannot claim it for her, as he is not the assignee or purchaser of that specific right, and if he were he would have no right to maintain the exclusive possession against the plaintiffs.

Fifthly. That the widow made a lease for sixteen years

from the 1st of January, 1864, under which the defendant claims, and that it was for the benefit of the plaintiffs, or of the eldest of them, and he has ratified the lease since he came of age. The fact of the lease is not denied, but it is the right to make it so as to bind the children by one who has no kind of authority to do so.

Whether the eldest one ratified it or not may affect him personally, but it cannot by possibility at all affect the others who are still under age. If the defendant rely upon this fact, he must limit his defence to the share of this particular plaintiff.

Sixthly. That the lessee and assignee have respectively entered and paid rent and made improvements under the lease and assignment, and they respectively believed the premises were their own for the term; and by force of the Statute the defendant says he is entitled to a lien on the premises, to the extent to which the land is enhanced by such improvements, and to the possession until his lien is satisfied.

36 Vic. ch. 22, O., declares that "In every case in which any person has made lasting improvements on any land under the belief that the land was his own, he or his assignee shall be entitled to a lien upon the same, to the extent of the amount by which the value of such land is enhanced by such improvement." This is a very extensive protection, and perhaps it may be called very advanced legislation to give a lien *in every case* to a person who has made improvements, even *lasting* improvements, on any land, *under the belief* that the land was his own.

If a person buy lot twenty, and enter by mistake—his own mistake—on lot nineteen, under the belief that he was on lot twenty, and build a brick house on it, is the owner of nineteen to be subjected to the payment of that useless or expensive building before he can occupy his land or sell it free from encumbrances?

Or is the person who buys a bad title to have a lien against the true owner for his improvements? If so the one who has to pay for the improvements should have the

right, at any rate, to sue the vendor of the bad title on his covenant for title, if the purchaser himself could sue him. But suppose the purchaser has taken no covenant, or only a qualified one, or the covenant is good for nothing, what is the true owner, who has to submit to the lien, to do?

Would it not be better to make the seller of the bad title liable on his covenant for the improvements in all cases, and not merely for the mere purchase money and interest, either for the whole value of the improvements or for such part of them as the Court might consider, on a view of all the circumstances, to be just and reasonable?

It would be better to do that than to let him go free, absolutely free, and to subject the innocent and unfortunate true legal owner to the payment of improvements which he may be quite unable to pay, and which must amount to a forfeiture of his land for the fault of two others who have benefited by it, and for no kind of fault or default of his own. This seems rather sharp legislation, but it is, unfortunately, too absolute in its terms, and it is directed against the only innocent man there is in the transaction, and he is without redress. He should be allowed, at any rate, if he elect, to abandon his land on being paid the value of it. There would be some equality in that.

Such a statute must be carefully executed in all cases.

Now, in this case, did the lessee or his assignee believe the premises were their own for the period of the term? The plea shews the whole facts, and that the lease was taken from the widow of the deceased mortgagor. People are not presumed to know what the law is—not in all cases, at any rate—but in no case does ignorance of the law excuse a person for liability for or from the consequences of his own act and conduct.

The lessee and assignee both shew they knew the widow of the owner of the land was making the lease. They cannot be excused because they may have thought she could, by law, make such a lease. They were not under the belief the land was their own by the lease, if the law does not excuse their ignorance in thinking the widow was

the competent legal person to make it. A person cannot resist a suit for specific performance of a lease merely because he did not understand the legal effect of the agreement he had made. He must perform it: *Powell v. Smith*, L. R. 14 Eq. 85. And a person with knowledge of his own and the landlord's title has no relief if he do an act which he is not expressly or impliedly encouraged to do by the landlord: *Ramsden v. Dyson*, L. R. 1 H. L. 129.

I am not disposed to attribute much weight to the claim which is made under the statute to have a lien declared upon the land for the value of the improvements under the circumstances here mentioned, although, on a fuller argument, it may be that more may be made of the statute than I am disposed to think.

Seventhly. The defendant asks, if his lien be not paid, that the premises be sold to satisfy it, and until the sale he says he is entitled to remain in possession, and, as far as I can make out, notwithstanding the sale, until the expiration of the lease. Probably the relief of a sale would be afforded, or an execution be allowed to be issued for the lien in some form, and against somebody or other, or against some property or other.

Eighthly. That Mrs. Carrick be made a party to the suit. It is possible that even that may be done too, if it should be necessary.

Ninthly. That all just accounts be taken between the parties. It is quite likely that may have to be done, if the case should require it.

I am not in favor of the defendant at present upon any point, but I do not feel that, after giving the case this consideration, I should agree in striking out or disallowing the plea. It will be more satisfactory, in every respect, that the case should be argued by the parties. So far, it has not been argued.

I am not satisfied that the denial of the plaintiff's title must be struck out merely because an equitable title is pleaded, and in equity the legal title would not be allowed to be disputed.

That arises on a different state of facts and under different circumstances from those under which the equitable defence is pleaded at law.

A person may deny the plaintiff's title and also claim by lease from him, but the moment the plaintiff shews the defendant does claim from him, that proves the plaintiff's title as against the defendant. But if the plaintiff have no title, and the defendant have no such lease, the plaintiff cannot recover merely because the defendant has said he had such a lease. These contradictory defences may be set up in ejectment the same as in other cases.

If the plaintiffs were suing in trespass, and "not possessed" were pleaded by the defendant, they would have to prove their title, and then the defendant could repel it by his lease; or the plaintiffs could prove the lease, if they wished, and so prove their title; or they could reply the lease by estoppel, and, in either case, show such additional facts as entitled them to the possession, notwithstanding the lease, as that there had been a forfeiture of it, and they had entered and determined it, and that the defendant had entered afterwards on the plaintiffs.

I do not think the defendant's case can be disposed of by the defences he puts in by way of answer. These defences are to be tried, and it rests with the plaintiffs to conclude the defendant, as soon as they please, from disputing their title, by proving the lease, which will be an estoppel.

I think the plaintiffs should be allowed to reply and demur. Such a right is necessary for the ends of justice, and the statute should be liberally expounded.

The conclusion I have come to is, that, as the Assizes are approaching, the plaintiffs should be at liberty to try the questions of fact, and when once the real facts are ascertained we shall be able to settle the questions of law remaining to be decided, without anticipating matters which may never be proved, or which have no existence, as is suspected to be the case with respect to some of the matters of this plea.

The rule will be discharged in all respects, excepting in so far as it relates to replying and demurring, and in that respect it will be absolute. The costs of the application to be costs in the cause.

Rule accordingly.

REGINA V. FRENCH.

32 *Vic. ch. 32, sec. 22, 23, 24, O.*—*Conviction for sale of liquor—Sale on Sunday—Sale without license—Proof of second and third offence.*

F. was convicted on the 5th of February before W. R., a J.P., "for that he did on Sunday, the 19th of January, sell and receive pay for intoxicating liquor at his hotel," and was fined \$40 and costs, to be paid forthwith, and in default of distress to be imprisoned for twenty days at hard labour. On the 12th of February, F. was convicted before D. S. and J. L., two J. P.s, for that he did "on Sunday, the 26th of January, sell and receive pay for intoxicating liquors," &c., "the same being the third offence," &c., and was fined \$100 and costs, and in default of distress to be imprisoned for fifty days.

A certificate of the first-mentioned conviction was before the magistrates on the second conviction. There was also evidence of the sale of liquor by defendant on three Sundays, but the informations did not allege the previous offence. It was not shewn whether defendant was licensed.

Held, that the first conviction was bad, for it did not shew whether it was for selling without a license, or having a license for selling on Sunday; and if for selling without a license it was bad, because it awarded imprisonment at hard labour; and if for selling on Sunday, then because it was not alleged to be a second offence.

Held, also, that the second conviction was bad, because, if for selling without a license, the fine was beyond what the statute warrants, and if for selling on Sunday, it was not shewn or charged that defendant was licensed; and because the information did not charge the two previous offences.

In Michaelmas term last, *M. C. Cameron*, Q. C., obtained a rule *nisi*, calling on Daniel Spence and John Large, two of Her Majesty's justices of the peace for the County of Wellington, and Joseph W. Trueman, to shew cause why the conviction by them of Alonzo French, on the 12th February, for selling, on the 26th January, and receiving pay for intoxicating liquor, contrary to the statute, to George Westacott, should not be quashed, said conviction being illegal, on the grounds:

1. That the same was not warranted by the evidence; that it does not shew that the said Alonzo French was

licensed to sell liquor in a tavern, store, or other place where liquors are allowed by law to be sold: that the conviction imposes a larger fine than by law, under the evidence, could be imposed; that the information on which the conviction was based does not charge the defendant with having committed two previous offences; that no conviction or convictions for two previous offences was or were shewn; and that it does not appear in and by said conviction that the defendant was or had been convicted of selling liquor on Sunday, before he sold the liquor for which he was convicted in said conviction.

Mr. *Cameron* also obtained a rule *nisi* to quash a conviction made on the 5th February, 1873, by William Richardson, J. P., on a similar offence by French, stated to have been committed on Sunday, the 19th January previous. The convictions and papers in each case were brought up to this Court by *certiorari*.

The information in the first mentioned case was made on the 10th February, 1873, and charged, that Alonzo French did sell and receive pay for intoxicating liquor upon Sunday, the 26th day of January last past, contrary to law. The information was signed by Joseph W. Trueman, and was taken before Daniel Spence, a justice of the peace of the County of Wellington.

The following evidence was taken by the justices on this complaint:

George Westacott, being sworn, stated: He was passing G. B. Gray's on that day. He asked him to leave a message with Mr. French about a muffler that was taken from Mr. French's in a mistake. He thought a traveller could get one glass of liquor, so he called for it, and got it and paid for it. It was on the 26th January. He had no motive for calling that day, except to deliver Mr. Gray's message. Only himself and the person riding in the jumper with him had liquor. He did not know of any one else getting liquor that day. He was sure he paid for it.

On cross-examination—He said he paid ten cents for it. He was a witness before on the whiskey case. On his

evidence Mr. French was fined previous to that time. He lived over twenty miles from Amaranth. On the first time, he was going to Trueman's; on the second time, he was going to Georgetown on business. (Question.—On what business at Georgetown? He refused to answer.) It was all at one time he told Mr. Trueman of getting liquor on Sundays. He got liquor three times on Sundays at Mr. French's. The first time was on the 19th January, the second time on the 26th January, the third time the Sunday following the 26th January, (the 2nd February). It was on the 3rd February, or on a Monday, that he told Trueman about getting liquor from Mr. French's. He told about the three times getting liquor at French's at one and the same time, to Trueman. On the 19th he paid French himself. French drank with him on the 19th, and he (witness) paid all. He always thought travellers were allowed one glass when travelling on Sunday. He paid the money to the man behind the bar the second time.

John Hadden said—He rode down with Mr. Westacott on a Sunday. He saw liquor sold in Mr. French's, and Mr. Westacott paid for it. It was on a Sunday, near the last of January, but he didn't remember the date. Didn't know what kind of liquor it was Mr. W. drank.

Defendant's counsel wished to call Mr. Trueman for cross-examination on his information. Trueman refused to be called for that purpose, but the magistrates considered the evidence heard to be sufficient.

The magistrates then adjudged, as follows: "We, the undersigned, do adjudge and impose a fine of one hundred dollars, and eight dollars and twenty cents costs, upon Alonzo French, innkeeper, for selling liquor on a Sunday, this being the third offence.

DAVID SPENCE, J. P. } *Convicting*
JOHN LARGE, J. P. } *Justices.*"

These Justices also returned the following certificate:—

"This is to certify that Alonzo French, hotel-keeper, Whittington, was, on the 5th of February instant, duly

convicted by me of selling intoxicating liquor on Sunday, 19th January, and for this, his said offence, was fined forty dollars and costs.

“Dated, the 12th day of February, A. D. 1873.

“W. RICHARDSON, J. P.”

The conviction in this matter stated “that on the 12th February, 1873, at the Township of Amaranth, Alonzo French is convicted before the undersigned justices of the peace in and for the County of Wellington, for that he, the said Alonzo French, did, on Sunday, the 26th day of January last past, sell and receive pay for intoxicating liquors, contrary to the statute, to George Westacott, the same being the third offence, and no evidence given that it was required for medicinal purposes. And we adjudge the said Alonzo French for his said offence to forfeit and pay the sum of one hundred dollars, to be paid and applied according to law, and also to pay to Joseph W. Trueman the sum of eight dollars and twenty cents for his costs in this behalf; and if the said several sums be not paid forthwith, we order the same to be levied by distress and sale of the goods and chattels of the said Alonzo French, and in default of sufficient distress, we adjudge the said Alonzo French to be imprisoned in the common gaol of the said County, at Guelph, for the space of fifty days, unless the said several sums and all costs and charges of the said distress shall be sooner paid. Given under our hands and seals the twelfth day of February, 1873, at Amaranth, in the County of Wellington.

“DAVID SPENCER, J. P. [L. S.]

“JOHN LARGE, J. P. [L. S.]”

The information in the matter before Richardson was in the same form as that already mentioned, and charged the offence to have been committed on the 19th of January.

The evidence in this case did not appear to have been returned with the *certiorari*.

The conviction was :—“That on the 5th day of February, in the year of our Lord 1873, at Amaranth, in the said

County of Wellington, Alonzo French is convicted before the undersigned, one of Her Majesty's Justices of the Peace * * for that the said Alonzo French did, on Sunday, the 19th day of January last past, sell and receive pay for intoxicating liquor at his hotel, Whittington. And I adjudge the said Alonzo French for his said offence to forfeit and pay the sum of forty dollars, to be paid and applied according to law, and also to pay to the said Joseph D. Trueman the sum of eight dollars and twenty cents for his costs in this behalf; and if the said several sums be not paid forthwith I order that the same be levied by distress and sale * * and in default of sufficient distress I adjudge the said Alonzo French to be imprisoned in the common gaol * * there to be kept at hard labor for the space of twenty days," &c.

"(Signed) WILLIAM RICHARDSON, J.P. [L.S.]"

During this term, *Harrison*, Q. C., shewed cause. It lies on the party accused to show a license when prosecuted for selling without a license, or doing an act where he would be liable to some penalty under this Act if he had not a license. Under 32 Vic., ch. 32, sec. 22, O., persons who have no license are liable to prosecution for selling without a license. Under sec. 23 persons who have a license are liable to prosecution for selling at improper times. This defendant is not prosecuted for selling without a license, but for selling at an improper time, and a *prima facie* case is made out against him, which he ought to rebut. If prosecuted under sec. 22, that section refers to the offences, and imposes, for the first offence, "*on conviction thereof*," not less than \$20 nor more than \$50, and for the second offence, "*on conviction thereof*," imprisonment; whilst sec. 24 says the penalty for the first offence against the provisions of sec. 23 shall be imposed, of not less than \$20 and costs, and shall be recoverable; for the second offence, a penalty of not less than \$40 with costs; for the third offence a penalty of not less than \$100 with costs. Under sec. 22 the number

of convictions may be ascertained by the production of a certificate under the hand of the convicting justice, or by other satisfactory evidence. Under sec. 24 the number of such offences is to be ascertained by the production of a certificate under the hand of the convicting justice, or by other satisfactory evidence, to the justices before whom the information and complaint may be made. It is not necessary, therefore, under sec. 24, that there should be convictions. It is only necessary there should be a first, second, or third offence of the party convicted. This might be ascertained by the certificate of the convicting justice, or other satisfactory evidence. If there were not convictions the offence might be shown by other evidence. Now here there was a certificate and other evidence as to the three offences, at the trial before the justices. See *Cross v. Watts*, 13 C. B. N. S. 239 ; *Re Barrett*, 28 U. C. R. 559 ; *Regina v. Strachan*, 20 C. P. 182 ; 36 Vic., ch. 34, sec. 6, O.; *Dillon on Municipal Corporations*, 2nd ed., sec. 55, note.

M. C. Cameron, Q. C., contra. Here the information is for selling intoxicating liquor. This is said to have been done on Sunday, the 26th January, which was contrary to law. The defendant is not charged with ever having committed that offence before, and the conviction states the same being the third offence, and that for this said offence he is to pay \$100, and in default he is to be imprisoned in the common gaol fifty days. There is nothing said in the information of having committed any such offence either once or twice before. On proof of the sale of the liquor, under the decided cases, and 36 Vic., ch. 34, sec. 6, O., he would be required to shew he was duly licensed to sell liquor, and having failed to do so he was liable to be fined, under sec. 22, not less than \$20 nor more than \$50, besides costs. He is fined \$100 or fifty days' imprisonment, which is clearly bad. If that was his third offence for selling without a license, he could not have been fined at all, but he could have been committed to the county gaol and kept at hard labour for six months. The whole scope of the statute is, that if a party, after being convicted, again

offends, then there may be cumulative punishment, but here the last conviction is made on the 12th February, for an offence committed on 26th January, whilst the second conviction is said to have been made on the 5th of February, for an offence committed on the 31st of January, so that the second conviction is for the last offence, and the last conviction for the second offence. The latter part of sec. 24 shews this could not be intended. It provides that convictions for several offences may be made under the Act, although such offences may have been committed on the same day. "Provided, always, that the increased penalties hereinbefore in this section imposed, shall only be recoverable in case of offences committed on different days." If it is not the conviction that subjects the party to the imposed penalties, but only the offences themselves, this conviction is for the *second* offence, and therefore bad. See *Regina v. Hoggard*, 30 U. C. R. 152; *Regina v. White*, 21 C. P. 354.

RICHARDS, C. J., delivered the judgment of the Court.

We think the conviction by Spence and Large is bad. If it be for selling without a license, the fine is beyond what the statute warrants. If it be for selling on a Sunday, it is not shewn or charged that he was licensed to sell liquors, so as to come within the provision of the 23rd section of the Act.

Nor does the information charge the defendant with having committed, or having been convicted of, two offences against the Act, before the complaint against him.

It appears to us, the cases cited by Mr. Cameron in this Court and in the Court of Common Pleas dispose of this case on the grounds just stated.

In the case of the other conviction, it is open to the same objections as to not stating whether the offence charged is for selling without a license, or, having a license, for selling on Sunday. If the conviction is for selling without a license, it is void for awarding imprisonment at hard labour, in default of payment of the fine and costs. If it is, having a license, for selling on Sunday, then, neither in the

information or the conviction is it alleged to be to second offence.

Under the authorities referred to we think the conviction bad.

Rules absolute.

WEBB ET AL. V. SHARMAN.

Contract by telegrams—Foreign principal.

One of the plaintiffs, W., of New York, and his agent, C., of Ingersoll, saw defendant at his cheese factory in Stratford, and talked of the price of cheese. W., in leaving, said any correspondence would be through C., from whom defendant would probably hear on plaintiffs' behalf, when the cheese was ready for sale. Subsequently, plaintiffs authorized C. to buy cheese from defendant, and on the 20th August, at 4 p. m., C. telegraphed defendant, "Name lowest price for your cheese, stating the number of boxes," which defendant received on the 21st. On the evening of the 21st, defendant telegraphed C, "Will sell 250 cheeses at 10½ cents," which C. received at 9.25 a. m., on the 22nd, and immediately answered by telegraph, "I accept your offer. When will you box? Answer," which was received at the Stratford office at 10 a.m., and by defendant on the same day. On the evening of the 21st, defendant had left a telegram to be sent to C. on receipt at the telegraph office of C.'s answer to defendant's telegram naming the price. It read, "I have sold in Stratford, did not get your answer in time." This was sent on the 22nd to C., on the receipt of C.'s telegram accepting, and C. answered at once that the plaintiffs would claim the cheese. The defendant in his evidence stated that he did not understand that C. was plaintiffs' agent when they came to his factory.

Held, that the telegrams shewed a complete contract.

Quære, per Wilson, J., whether the words, "when will you box?" after accepting defendants' offer, might not be considered as leaving the bargain still open as to time; but it was inferred from the evidence, the case being tried without a jury, that the parties did not so regard it.

Per Morrison, J., it was an enquiry collateral to the contract, and not qualifying the acceptance.

Held, also, that the plaintiffs, though foreign principals, might sue upon the contract, there being evidence to shew that C. was authorized by them to enter into it on their behalf, and that defendant dealt with him as plaintiffs' agent.

APPEAL from the County Court of Oxford.

The action was tried before the learned Judge, without a jury.

It was brought to recover damages for the non-performance of a contract for the sale of 250 boxes of cheese, alleged to have been bargained and sold by the defendant to the plaintiffs.

Plea—Non-assumpsit.

From the evidence it appeared that one Caswell, who resided at Ingersoll, was the agent of the plaintiffs, who resided in New York, for the purchase of cheese: that the defendant knew one of the plaintiffs, having been introduced to him the year previous to the sale in question; that the plaintiff Webb was also at the defendant's cheese factory in Stratford; that Webb and the defendant talked about the cheese, the agent Caswell being present, and as they were parting, Webb said that any correspondence would be through Caswell (the agent); that while the plaintiff, Webb, and defendant were looking at the cheese, the defendant asked ten cents per lb.; that the plaintiffs subsequently authorized Caswell to buy the cheese for them; and that Caswell shortly after telegraphed the defendant on the 20th August, 1872.

"Name lowest price for your cheese, stating number of boxes."

This telegram (A) was sent at 4 p.m., from Ingersoll addressed to defendant at Stratford. It reached Stratford that evening, and was next day, 21st, delivered to defendant.

The defendant in reply delivered to the telegraph operator at 6.16 p.m., of the 21st, the following telegram (B) which was sent off: "Will sell 250 cheeses at $10\frac{1}{2}$ cents," and it was received by the agent, Caswell, at 9.25 a.m. on the 22nd August.

At 9.55 a.m., on the same day Caswell telegraphed (C) "I accept your offer. When will you box. Answer." That telegram was received at the Stratford office at 10 a.m., and was delivered that day to defendant at the office, where it remained, by his instructions, until he, defendant, called for it, he having said that he would call for it.

It appeared that on the evening of the 21st a telegram (D) was left at the Stratford office by defendant with instructions to send it if any answer accepting his offer came to the telegram (B). It was as follows: "I have sold in Stratford, did not get your answer in time."

This telegram was sent to Caswell upon the receipt of (C), and, although dated 22nd, was received by the operator on the 21st, and was delivered to Caswell at 12 a.m. on the 22nd August.

To this the agent replied (E), on the 22nd August at 12.45, "Answered your telegram immediately, accepted your offer and advised Webb of purchase by telegraph. He will claim cheese."

All these telegrams went through the Toronto office, *i. e.* from Ingersoll to Stratford via Toronto, and *vice versa*.

Webb, one of the plaintiffs, was examined on the trial, and he testified, that he had been at defendant's factory with Caswell, his agent for buying cheese, and that he took him with him for that purpose: that he saw defendant: that he let him know that he was going round with the intention of purchasing: that he inquired of him the price, and that he, plaintiff, told him that when the cheese was ready for sale he would probably hear from Caswell on his, the plaintiff's, behalf: that he afterwards authorized his agent to buy 1000 boxes, giving him a list of the factories to purchase from, among them the defendants, and he stated that what Caswell did in this case was done acting as their agent: that Caswell telegraphed him he had bought the cheese from defendant at 10½ cents; that defendant knew where the plaintiffs resided and did business.

The defendant was called, for the defence. He did not materially contradict the plaintiffs' testimony, except in this, that although the plaintiff and Caswell were at the factory together, he did not understand that Webb came there to purchase cheese, or that Caswell called or was there as his agent.

Several objections were taken at the close of the case. A verdict was entered by consent for \$175, leave being reserved to move to enter a nonsuit or to reduce the verdict.

In the following term a rule *nisi* was granted, the grounds for nonsuit being that the contract, if made, was between defendant and Caswell only, and not with the

plaintiffs : that if the plaintiffs were not bound the defendant was not : that Caswell had no authority to pledge the plaintiffs' credit : that the offer of the defendant was conditional on its being accepted immediately in point of time, and that it was not accepted, and so there was no contract. Other grounds were stated, but nothing turned on them.

After argument the learned Judge made the rule absolute to enter a nonsuit, and against that decision this appeal was brought.

During Hilary Term, 1873, the case was argued. *Richards*, Q.C., for the appellant. The undisclosed principal can adopt the acts of his agent, and may bring an action even though the agent's conduct may not have been such as to bind the principal. There was a complete contract by the telegrams: *Carter v. Bingham*, 32 U. C. R., 615, and cases there referred to. [WILSON, J.—Do not the words, “When will you box?” in the telegram from Caswell to defendant, leave the transaction between the parties indefinite as to time?]: *Re Imperial Land Co. of Marseilles, Harris's Case*, L. R. 7 Ch. App. 587, is, we contend, an authority to the contrary. The rule as to the rights of undisclosed principals is laid down in *Addison* on Contracts, 6th ed., 598, 600, and the cases there cited, and at page 525 the obligation of foreign principals is referred to. There is no rule of law to prevent the principle so laid down applying to a foreign principal. See also *Story* on Agency, 7th ed., sec. 420. The Law Reform Act does not apply.

Harrison, Q. C., for the respondent. We are not confined to the grounds taken by the Judge below. We contend, first, there was no contract with Caswell. Second, if there was, the plaintiffs are foreign principals and cannot adopt it. Third, the plaintiffs should shew that credit was given to the principal: *Mahony v. Kekule*, 14 C. B. 390; *Green v. Kopke*, 18 C. B. 549; *Wilson v. Zulueta*, 14 Q. B. 405; *Risbourg v. Bruckner*, 3 C. B. N. S. 812; *Rathbon v. Budlong*, 1 Am. L. C., 5th ed., 742. It has been held that a foreign principal

is on a different footing from a domestic one; there is no privity with a foreign principal: *Peterson v. Ayre*, 13 C. B. 353; *Poirier v. Morris*, 2 E. & B. 89; *Lennard v. Robinson*, 5 E. & B. 125; *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Thompson v. Davenport*, 2 Sm. L. C., 6th ed., 360; *Kirkpatrick v. Stainer*, 22 Wend. 244. Next, the telegrams do not shew a contract: *McIntosh v. Brill*, 20 C. P. 426; *Carter v. Bingham*, 32 U. C. R. 615.

S. Richards, Q.C., in reply, referred to *Leake* on Contracts, 295, 296; *Re Imperial Land Co. of Marseilles*, *Harris's case*, L. R. 7 Ch. App. 587.

MORRISON, J.—The first question arising on this appeal is, whether there was a complete bargain made between the agent, Caswell, and the defendant, and in my judgment there was.

The contract was one effected by telegraph. Caswell having had some correspondence previously, the telegram (B) of the defendant making the offer was transmitted or sent off shortly after it was received by the operator at 6.16 p.m. on the evening of the 21st August, rather a late time to expect an answer that evening. From the evidence of the operator it had to be forwarded to Toronto and repeated from there to Stratford.

The operator stated that to ensure an answer that night the sender might do so by paying extra, half the original rate, and that this the defendant did not request to be done.

On the morning of the 22nd at 9.25 a.m. it was received at Ingersoll, and a few minutes after it was delivered to Caswell; and within half an hour it was replied to by telegram (C) which was received about 10 a.m. at Stratford, and delivered to defendant that day when he called at the office.

In the meantime defendant's telegram (D) was sent to Caswell on the receipt at the office of (C) by the operator, in pursuance of defendant's instructions the night before, when he left it with the operator to be sent, if Caswell accepted defendant's offer.

So in fact what the defendant did was this. He sent an offer to Caswell at 6.16 p.m., and that evening, before he received or had time for a reply, he resold the cheese at an advance, leaving a telegram to be sent in the event of Caswell accepting his offer, saying that he had sold the cheese, resting upon the chance that his offer might be declined, instead of communicating at once that he had withdrawn his offer of that evening.

No time was lost by the plaintiffs' agent in accepting the offer, and so in my opinion the offer and acceptance concluded the bargain.

It was suggested on the argument by my brother Wilson (the point was not taken in the Court below), whether the words, "When will you box," in telegram (C), might not have the effect of leaving defendant's offer not definitely accepted or open to a qualification.

I think not. It was an inquiry *per se*, collateral to the contract, an inquiry which would naturally spring after a complete agreement, and in no way calculated to vary the offer and acceptance, and such an inquiry as would arise upon a completed agreement, such as "When may I come for the cheese?" "When will you be ready with it," &c. "When will you box," it is clearly meant "When will you put the cheeses in their boxes, so that we can go for it."

In my judgment it suggested no new stipulation.

As said by the learned Chief Justice of this Court, in *Thorne v. Barwick*, 16 C. P. 375, "Taking the whole correspondence together, and putting a reasonable interpretation upon it, such as we ought to give to all commercial contracts entered into by letters and telegraphic communications, the proper conclusion is, that a binding agreement was made between the parties."

See, also, *Harty v. Gooderham*, 31 U. C. R. 18; *The Proprietors, &c., of the English and Foreign Credit Co., Limited v. Arduin*, L. R. 5 H. L. 64.

The evidence at the trial clearly shewed that Caswell was the agent of the plaintiffs in purchasing the cheese, and that he was making the contract on their behalf.

The next question, and the one upon which the learned Judge in the Court below principally rested his judgment, is, whether these plaintiffs having their place of business in New York, and so foreign principals, can maintain this action.

The learned Judge in my opinion misconceived the effect of what was said by Blackburn, J., in *Armstrong v. Stokes*, L. R. 7 Q. B. 598, and its application to the circumstances of this case.

There the plaintiff was a merchant in Manchester having dealings with R. & Co., who were commission merchants and dealers on their own account at Manchester. On the 15th June, the plaintiff's salesman made a contract with R. & Co.'s salesman for goods, which goods were sent to R. & Co. on the 24th July. R. & Co. on the 30th August stopped payment. It was not pretended the plaintiff knew before the 30th August that defendants had anything to do with the transaction, but in the course of an examination of R. & Co.'s books in bankruptcy, the plaintiff discovered that R. & Co. had been acting as commission merchants for the defendants, and so the plaintiff contended he was entitled to recover against the defendants as being undisclosed principals of R. & Co. The question of a foreign principal did not arise in any way.

The first point in the case was a question of fact, what was the authority given to R. & Co. by the defendants, and Blackburn, J., said, at p. 603, "It is we think too firmly established to be now questioned, that, where a person employs another to make a contract or purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind come now too late: for we think that it is established law that, if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed

principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him with whom alone he believed himself to be contracting, and to whom alone he gave credit, and to leave the trustees of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price direct from the principal, subject to an exception, which is not so well established as the rule, and is not very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor."

The learned Judge then proceeds to consider whether the evidence establishes the defendants as principals, and after stating there is evidence both ways proceeds further, on page 605, and this is the portion of the judgment upon which the decision of this case in the Court below was based :—

"The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account, It is true that this was originally (and in strictness perhaps still is) a question of fact ; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of any bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of any bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign con-

stituent's credit. Where the constituent is resident in England the inconvenience is not so great, and we think that, *primâ facie*, the authority is given, unless there is enough to shew that it was not in fact given."

There the Court did not feel justified in finding that question in favour of the defendants, although it was strongly urged there was no privity between the defendants and the plaintiff, from whom R. & Co. obtained the goods.

It was not necessary to the decision in that case to decide anything respecting the liability of a foreign principal. The learned Judge was only pointing out the exception to the general rule, and the reason of it. Nothing is said from which we are to infer that the Court was deciding that a foreign merchant may not enter into contracts through a resident agent, with the liability of being sued, or the right to sue on it, as the case may be.

In *Paice v. Walker*, L. R. 5 Ex. 173, which was an action against agents of a foreign principal, the defendants signed in their own names a contract note in which they said "sold (plaintiff) London about 200 quarters of wheat (as agents of John Schmidt & Co., of Danzig). It was held that the words "as agents" in the body of the contract did not prevent their liability as principals.

The question of foreign principals was referred to in the respective judgments. It was not there contended that as agents of foreign principals they were necessarily liable irrespective of the contract.

Cleasby, B., in giving judgment said, at p. 178, "I am not disposed to reject or to give less than considerable weight to the fact that this contract shews on the face of it that it was made on account of a foreign principal. It is laid down in *Buller* N. P. 130, that 'where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise will be presumed to be made to him, the rather so, as it is much for the benefit of trade.' The author only qualifies this by

adding that there is nevertheless a contract also with the principal."

In the case of *Green v. Kopke*, 18 C. B. 549, the question of a foreign principal was fully discussed. It was there contended that the fact of the principal being a foreigner entitled the plaintiff to sue the agent making the contract, upon the alleged well known rule of law that an agent contracting for a foreign merchant may be treated as the principal.

Jervis, C. J., said, p. 544, "As a matter of law, no such rule exists. That is all explained and the doctrine of *Story* controverted in 2 *Kent's Comm.* 630, where the rule is laid down," which the learned Chief Justice goes on to quote at length, as well as Mr. Justice *Story's* view of it, and the view taken of the question of a foreign principal by the Court of Errors of the Supreme Court of the State of New York, which questioned the policy of the rule that credit was not presumed to be given to well established foreign houses, but to temporary agents in exoneration of their principals.

When I turn to *Story* on Agency, 7th ed., secs. 268, 269, above alluded to by Jervis, C. J., I find a long note in which the matter is discussed.

See also the case of *Taintor v. Prendergast*, 3 Hill 72, 73, where Mr. Justice Cowen, delivering the judgment of the Court, makes the following remarks pertinent to the point raised in this case, "It may be admitted, as was urged in the argument, that whether the principal be considered a foreigner or not, his agent, omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend, it would be too strong to say, that, when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said when a clear intent is shewn to give an exclusive credit to the agent." And after referring to *Thomson v. Davenport* 9 B. & C. 78, he adds, "It will be seen by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is, where the creditor knows there is a foreign principal, but makes his

charge in account against the agent. If the seller be kept in ignorance that he is selling to an agent or factor, I am not aware of a case which denies a concurrent remedy. On the other hand, I am still in want of an authority that, where an agent acquires rights in a course of dealing for his principal, whether the latter be foreign or domestic, and his name is kept secret, the principal may not sue to enforce those rights. I admit that the defendant is not by such form of action to be cut off from any equities he may have against the agent. So far the latter is considered the exclusive principal; but no farther. As a general rule the latter cannot maintain an action in his own name at all; and the exception will be found to arise from cases where he has the rights of a bailee, or some other *rights*, not the mere powers of a naked agent."

Jervis, C. J., in giving judgment in *Green v. Kopke*, 18 C. B. 558, said, "No doubt, as has been said by learned Judges more than once, the fact of the principal being a foreigner is entitled to some weight; but there is no rule of law, as is suggested by Mr. Brown, that the agent is in all cases liable personally where the principal is a foreigner residing abroad. * * Chancellor Kent in his very valuable Commentaries, puts it on the ground on which we now put it, and, in the passage to which I referred in the course of the argument, qualifies and repudiates to that extent the doctrine laid down by Dr. Story. It is admitted that, if this had been the case of an English principal the principal and not the agent would have been liable. That admission seems to me to put the plaintiff out of Court."

Willes, J., said, p. 560, "Whether the defendant contracted as agent or not, is a question of fact—as Parke, B., says in *Heald v. Kenworthy*, 10 Ex. 743—and not a conclusion of law. If a broker buys goods for a merchant, naming him, and stating that he lives in Australia, unless he at the same time stated that he was buying *only as agent*, the jury would be warranted in holding him to be personally liable."

Green v. Kopke was a case where the defendant was an agent of a foreign principal who purchased as agent, and was held not liable.

In *Heald v. Kenworthy*, 10 Ex. 743, above mentioned, it was being argued that the rule under which the principal when discovered is liable to the seller was limited, and the instance of a foreign principal was stated. Parke, B., at p. 743, said, "The question of his liability is one of fact. Where the seller deals with an agent resident in this country, and acting for a foreign principal, the presumption is, that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. That is a question of fact and not of law."

So in *Cothay et al. v. Fennell et al.*, 10 B. & C. 672. There Cothay, one of the plaintiffs, carried on business in London and acted as agent for some of the plaintiffs at Glasgow and some at Manchester. He gave an order in his own name, and the broker knew him only. It was contended that Cothay could alone sue. The Court held that "If an agent make a contract in his own name, the principal may sue and be sued upon it, for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made."

In *Parsons' Mercantile Law*, 2nd ed., p. 163, the learned author, referring to the distinction between a foreign and a domestic factor, says, "A foreign factor is as to third parties,—for most purposes and under most circumstances,—a principal. Thus they cannot sue the principal, because they are supposed to contract with the factor alone, and on his credit, although the principal may sue them."

On the whole, after a careful consideration of the cases and text books, I can find no authority or case supporting the view urged by Mr. Harrison, that a foreign principal, known or undisclosed, cannot sue upon a contract entered into for him by a domestic agent, and in the absence of authority I am at a loss to see upon what ground or principle he cannot do so.

One of the grounds upon which the learned Judge rested his judgment was, that there was no privity; but the same

may be said in all cases where there is an undisclosed principal, and where the seller is dealing with the agent as a principal, and in ignorance of any other.

The foreign principal who contracts by a domestic agent is the party really and beneficially, and perhaps solely interested, and equally so as if he resided in this country. The bringing of the action in his name can work no injustice to the other party. If between the latter and the agent any equities exist, he is entitled to the benefit of them.

Nearly all the cases in the books are cases where the seller is endeavouring to make the domestic agent responsible, and it is in such cases that the rule laid down in *Paley*, on Principal and Agent, 3rd ed., 248, is invoked, viz., "If the principal be a foreigner, it seems that, by the usage of trade, the credit is to be considered as having been given to the English broker, and that he only and not the foreign buyer, will be liable. That question, however, is for the jury."

That is a rule in favour of the seller, but if it is shewn by evidence that the agent was authorized by the foreign principal to enter into the particular contract, and that the party was contracting as agent, the rule fails.

As said by Jervis, C.J., in *Green v. Kopke*, 18 C.B. 549, it is a matter of intention and fact that the foreign constituent's credit was pledged, subject to the presumption, in the absence of evidence of express authority in such a case from the foreign merchant to the domestic agent to so contract, that the seller solely contracted with the agent and upon his credit.

That is the effect of what was said by Blackburn, J., in *Armstrong v. Stokes*, L. R. 7 Q. B. 598.

But if the foreign merchant specifically authorizes his domestic agent to enter into a contract on his behalf, I see no reason for holding that the parties are placed in a different position from that in which they would be were they all residing in this country.

In the present case there is no doubt that the plaintiffs authorized Caswell, as their agent, to enter into the contract sued on.

It was not denied that on such a contract, if the parties were all residents here, the plaintiffs could bring this action, and it seems to me that is an answer to this defence.

The evidence given on the trial went rather to shew that the purchase of the cheese was to be paid for in cash.

I have not referred to the point as it was not discussed, but I think that if it were so, there was then no ground for arguing that the action was not properly brought.

On the whole I am of opinion that the appeal should be allowed; that the judgment of the Court below be reversed; and that the rule to enter a nonsuit be discharged.

WILSON, J.—The telegram “I accept your offer. When will you box? Answer,” is not conclusive, that the bargain was then and thus closed.

“When will you box,” are words that may have different significations. They may amount to a mere collateral enquiry, the exact time of the boxing being of no particular consequence, and both parties may have quite understood the bargain was closed.

But they may also be of the most essential consequence. Suppose the party on being asked, “When will you box?” had said, “I’ll not tell you,” or “Not for a week or a month,” might not the other party have said, “If you will not tell me when you will box, I will not take the cheese;” or, if he had said he would not box for a week, or a month, might not the other have said, “That will not do. I must have the cheese in one day, two days, or three days, and if you cannot give it to me by that time it will be of no use to me, and I cannot take it.” I think all that might have been said and meant, and that the telegram on its face is not conclusive evidence that a bargain was made, without something further being shewn.

I understand this point was not taken at the trial, nor during the argument until it was suggested. That being so, one may I think, acting as a jury, infer that the parties did not attach that degree of importance to it which

has been stated, but considered it a mere collateral enquiry, made perhaps to enable the purchaser to attend at the station to receive the cheese, or to make some other arrangement with respect to it not at all material as an essential of the contract.

As to foreign principals or constituents see *Die Elbinger Actien-Gesellschaft Für Fabrication Von Eisenbahn Materiel v. Claye*, L. R. 8 Q. B. 313; and *Hutton v. Bullock*, L. R. 8 Q. B. 331.

The rule is that "Where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain shewing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner." Per Blackburn, J., in the case above quoted, L. R. 8 Q. B. 313, 317.

Blackburn, J., also said in the same case, the right to sue and be sued were correlative, "A man cannot make a contract in such a way as to take the benefit, unless also he take the responsibility of it."

Lush, J., said, at p. 318, "But if the principal be made a party to the contract, he must be both able to sue and liable to be sued; for, here, I also agree with my brother Blackburn that he cannot be a party so as to be able to sue, and yet not a party so as to be liable on it."

The question of liability in such a case, if there be any evidence to warrant its being left to the jury, is for the jury. The Court in that case was of opinion there was no evidence to leave to the jury at all, and that plainly the foreign constituent could not maintain the action.

The last of the cases above cited shews that the same rule applies where the foreign constituents are having purchases made for them "on joint account of the foreign constituents and an English firm."

I think it is settled that *prima facie*, in such a case as the present, the contracting parties were Caswell, the buyer, and the defendant, the seller, because the plaintiffs, for whom Caswell was in fact acting, were foreign constituents residing in New York.

There was evidence that one of the plaintiffs saw the defendant personally, they talked together about the plaintiffs buying cheese at Stratford in company with Caswell, and that Mr. Webb said to defendant that any correspondence would be through Mr. Caswell, and when the cheese was ready the defendant would probably hear from Caswell, on the plaintiffs' behalf, and that the defendant knew where the plaintiffs resided and did business.

The defendant said he did not understand Webb came to the factory to purchase, or that Caswell was there as his agent.

That was no doubt evidence to be left to the jury, as to whether the contract was made between the plaintiffs and defendant by Caswell acting as agent for the plaintiffs, or whether the transaction was carried on between Caswell and the defendant as the direct and only contracting parties.

If it be thought the evidence reasonably preponderates against the defendant, I am not disposed to question it.

I refer also to *Ireland v. Livingston*, L. R. 5 H. L. 395, 408.

RICHARDS, C. J., concurred.

Appeal allowed without costs.

WALTER V. DEXTER.

Conveyance of land—Parol reservation of trees—Trespass by grantee for cutting them—Equitable plea.

Declaration *q. c. f.*, for cutting and removing trees, with a count in trover and the common counts.

Pleas, leave and license; and a special equitable plea, setting up that the defendant being owner of the land, contracted by parol to sell it to the plaintiff, and that at the time of such contract and of the conveyance of the land to defendant it was expressly agreed that defendant should have certain trees thereon, and be at liberty to cut and remove them, but that such reservation should not be and it accordingly was not inserted in the conveyance; and that the defendant entered and cut the trees, &c., which are the trespasses, &c. The defendant, as a witness at the trial, having proved the sale of the land, it was proposed to shew by him the agreement as set up in the equitable plea.

Held, That such evidence was improperly rejected, for that it was admissible both under the equitable plea and the plea of leave and license.

Semble, that the equitable plea shewed a good defence; and that at all events the plaintiff having taken issue upon it, the defendant was entitled to have the issue tried.

DECLARATION: Trespass, *quarè clausum fregit*; and that defendant cut down trees growing on land of plaintiff, and carried them away. There was also a count in trover, and the common money counts.

Pleas: *Inter alia*: leave and license to the two first counts; and a special equitable plea, setting out, that the defendant, being owner of the land, contracted with the plaintiff by parol to sell the land to him, and that the defendant should have certain trees on the land, and should be at liberty to enter upon the land and remove them; but that the reservation and right to cut and remove them should not be inserted in the conveyance; that defendant, in pursuance of such contract, executed a conveyance of the land to the plaintiff; and that, relying on the said agreement and the right to cut and remove the trees, the defendant entered, and cut and removed the trees in pursuance of the agreement, which are the trespasses and conversion in the first and second counts. Issue.

The case was tried before Galt, J., at Simcoe, at the Spring Assizes of 1873. The defendant was called on the part of the defence, and, during his examination, having proved that he sold the land to plaintiff, it was proposed by the defendant's counsel to prove also that it

was part of the bargain that the timber in question should be reserved, and that it was not put in the deed at the request of the plaintiff, &c., as in the equitable plea; and it was also contended it was evidence under the plea of leave and licence.

This evidence being objected to by the plaintiff's counsel, the learned Judge sustained the objection; and the plaintiff had a verdict of \$200.

During last Easter Term, *M. C. Cameron*, Q. C., obtained a rule to set aside the verdict, and for a new trial, on the ground that the verdict was contrary to law and evidence, and for the rejection of evidence, and for excessive damages, and on affidavits; the rejection of evidence by the learned Judge being the refusal to allow the defendant to prove that he and the plaintiff had agreed that the trees on a part of the land mentioned were to be reserved to the defendant and cut by him afterwards—such evidence being admissible under the plea of leave and licence, and the plea pleaded on equitable grounds.

In last term, *C. S. Patterson*, Q. C., shewed cause. The evidence was not admissible under leave and license, unless there was a grant of the trees, and here there was a mere reservation: *Hewitt v. Isham*, 7 Ex. 77. There is no difference between law and equity on this point: *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Ex. 70. On the question of license, see *Prince v Case*, 2 Am. L. C., 5th ed., 553.

M. C. Cameron, Q. C., supported his rule. Reservation before the deed is equivalent to license after the deed, when acted on. No revocation of the leave is shewn or pretended. Under the equitable plea, we may shew a parol arrangement between the parties. The following cases apply to the plea of leave and license: *Hewitt v. Isham*, 7 Ex. 77; *Kavanagh v. Gudge*, 7 M. & G. 316. As to the equitable plea: *Steele v. Haddock*, 10 Ex. 6; *Davis v. Marshall*, 7 Jur. N. S. 1247, 4 L. T. N. S. 581.

MORRISON, J., delivered the judgment of the Court.

In this case we are of opinion that the rule should be made absolute for a new trial, on account of the rejection of the evidence offered by the defendant in proof of the equitable plea, as well as the plea of leave and license.

What the plaintiff complains of is, that the defendant entered on his land, and cut down and carried away certain trees.

The plea on equitable grounds alleges that the defendant, being the owner of the land in fee, contracted by parol with the plaintiff for the sale and conveyance of it to him, the plaintiff: that it was part of such contract, and at the time of the conveyance of the land to the plaintiff expressly agreed between the parties, that the defendant should, after the conveyance to the plaintiff, have for his own use and benefit the trees in question, and that he should be at liberty to enter upon the land and cut and remove the trees: that it was agreed at the time of the conveyance, upon the suggestion and request of the plaintiff, that the reservation and right to cut and remove the trees should not be inserted in the deed of conveyance; that he, the plaintiff, in pursuance of such agreement, executed the conveyance, and, relying on the agreement, no reservation or right to cut and remove the trees was inserted in the deed; and the plea further alleges that the defendant, after the execution of the conveyance, in pursuance of the agreement and reservation, entered upon the land and cut and removed the trees, as he lawfully might; and that these are the trespasses complained of.

It seems to us, assuming the facts alleged in the plea had been proved on the trial, that the plaintiff was not warranted in bringing an action against the defendant for doing that which the plaintiff authorized and consented to.

I should suppose, in equity, that if one induces another to omit or leave out of a deed of conveyance which he is about taking a reservation such as appears in this case, and which was one of the terms or considerations upon

which the grantor agreed to execute the deed, upon the grantee agreeing, consenting, and authorizing the grantor to enter and cut the trees, and that the latter does so before any withdrawal or revocation of such consent or authority, that for such entry, &c., he cannot be liable as a trespasser.

If the facts pleaded do not amount to leave and license at common law, I should think it a good equitable plea.

At all events, as issue was taken on the plea, the defendant was entitled to have the issue tried.

The case of *Morgan v. Griffith*, L. R. 6 Ex. 70, is I think, an authority to some extent in favour of the defendant's contention. There the plaintiff, before he would take a lease of a farm, insisted that a term should be inserted in it that the rabbits should be destroyed. The lessor, the defendant, refused compliance, but he said, "I promise you faithfully they shall be destroyed." The lease contained a stipulation that the tenant should not shoot, hunt or sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow his landlord and friends to shoot, &c. The defendant failed to destroy the rabbits, and the tenant brought an action for damage done to the grass and crops. It was contended that the evidence of the promise of the defendant could not be received in evidence, as it added to and varied and was inconsistent with the express terms of the lease. The evidence was received, and the jury was asked whether the lease had been signed by the plaintiff on the promise of the defendant to destroy the rabbits. They found for the plaintiff, and the question for the Court was whether the evidence was admissible and the direction right.

Kelly, C. B., said, at p. 73, "All that is possible has been said on behalf of the defendant, but it has failed to convince me. I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease, and a Court of Equity would not have compelled him to do

so, or only on the terms of the defendant performing his undertaking."

And Pigott, B., said: "The verbal agreement in this case, although it does affect the mode of enjoyment of the land demised, is, I think, purely collateral to the lease."

Irrespective of that plea, I think it was competent for the defendant, under his plea of leave and license, to give evidence to shew that at the time of the conveyance the plaintiff authorized and gave the defendant leave to go on the land, and cut and remove the trees in question; and that in consequence of such license, and before any revocation of it by the plaintiff, he did what is complained of.

It is true that such a parol executory license is countermandable at any time, and in this case it may be that the plaintiff, if he gave such license, could have revoked it while the same was executory; but if the plaintiff did not revoke it before the defendant cut and removed the trees, the license itself ought to excuse the acts so committed while it was uncountermanded.

In *Cornish v. Stubbs*, L. R. 5 C. P., 334, Willes, J., said, in giving judgment, at p. 339, "The rule of law is, that a simple license, in order to be binding on the licensor, must be under seal; but if it is not the licensee is not a trespasser until the licensor revokes the license."

In *Hewitt v. Isham*, 7 Ex. 76, where there was a plea of leave and license, the plaintiff was tenant to the defendant under a parol demise, containing a stipulation that trees, &c., were reserved to the landlord. At the trial, the trespasses complained of being that the defendant's men entered on the place and cut down trees, &c., the jury were directed that the stipulation offered evidence of leave and license. The verdict being moved against for improper reception of evidence and misdirection, the rule was refused.

Pollock, C. B., said, at p. 78, "I am satisfied we ought to grant no rule. The demise not being by deed, the stipulation in question cannot operate as a grant; but the law will construe it in some way so as to effectuate the intention of the parties. Had it been by deed, the law would

have construed it as a grant, and have implied a right to go upon the land for the purpose of cutting and carrying away the trees. But, as the reservation is by parol, it will operate as a license to the same extent as if it had been a grant. The learned Judge was therefore correct in telling the jury that this was evidence of leave and license, and that it was competent for them to find that issue for the defendant."

I may also refer to *Roffey v. Henderson*, 17 Q. B. 574. There the action was brought by a former tenant of the premises against the then tenant, to recover certain fixtures left on the demised premises, and which the plaintiff, claimed a right to remove after the expiration of his term under a license from the landlord. It was conceded that the license was void in law, being a license to enter at a future time and sever something, part of the freehold, and *Wood v. Leadbitter*, 13 M. & W. 838, was relied on. It was, however, conceded that such a license might have been alleged in defence of trespasses actually committed, but it was revoked by the subsequent demise.

In giving judgment, Patteson, J., said, at p. 585 "Until the expiration of the plaintiff's tenancy, the landlord had no right of possession: the actual possession was in the plaintiff: the license therefore, if any, was prospective. * * * Such a license, having such a prospective operation, is something like a grant of interest in the land: but at all events it is a grant of authority to enter and remove something at a future time, which might have been valid if executed. * * * But the elaborate judgment of the Court of Exchequer in *Wood v. Leadbitter*, 13 M. & W. 838, shews that not being granted by deed, it cannot, against the defendant, sustain the first count of this declaration."

On the whole, we think the evidence ought to have been received; and on that ground we think there should be a new trial.

The rule was moved upon other grounds, but it is unnecessary to consider them.

New trial without costs.

JOHNSTON V. NORTHERN RAILROAD COMPANY.

Railway—Want of care in crossing—Contributory negligence

It is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is contributory negligence.

In this case, the plaintiff having approached and attempted to cross the track at a trot, and without looking out, though he could have seen along the line in either direction for some distance. *Held*, that he could not recover for an injury sustained by collision with defendants' train, and a nonsuit was ordered.

It was urged that the evidence set out below disclosed negligence on the part of the defendants in allowing cars to be on a siding, obstructing the view while the train was passing: but *Seemle* that it did not.

DECLARATION charging the defendants with so negligently, &c., driving their engine and train of cars along their railway, which the plaintiff was crossing with his waggon and horses, that the engine, &c., struck against the waggon, whereby the plaintiff was thrown out, and permanently injured, &c.

Plea, not guilty.

The cause was tried at the Spring Assizes for Toronto, in 1873, before Galt J.

It appeared from the plaintiff's evidence that on the 22nd May, about 10 a. m., he was driving a waggon with a pair of horses, along the town-line road, eastward, between Whitchurch and East Gwillimbury, close to the defendants' railway station at Newmarket, having his sister and a young woman with him in the waggon: that, as he approached the crossing of the railway, the track, at that point being double, on account of a siding being placed there, he did so driving at a moderate trot; (and by a plan produced at the trial, from the direction the plaintiff was going, and the train in question coming, he was best placed for a view of the train, as the railway crossed the road diagonally): that upon the siding there were some cars standing, waiting there it appeared to proceed when the train in question passed down the main line: that these cars prevented him from seeing up the line: that he had just passed the cars, driving at a moderate trot, on to the

railway track, and when on the railway he saw the train, which was coming, as he said, very swift; that when he saw it he loosened the reins and shouted to his horses, which increased their speed, and they started on the run, but did not fully cross the track before the engine struck the hind wheel of the waggon; that the plaintiff, and those with him, were thrown out, the horses running away: that he heard no bell; that he looked out when he came to the crossing, but did not stop his horses, and did not see the engine until he was on the rails, and that he heard no noise.

A witness, who followed, driving close behind the plaintiff, and who turned off at the station, stated, that when he got close to the cars standing on the track, he saw the locomotive pass down the main track: that he was watching for it: that he heard the whistle when the locomotive was south of the switch, and at that time he did not think he had parted from the plaintiff: that the plaintiff had as good an opportunity of hearing the whistle as he had; and he (the witness) thought he had a glimpse of the train when he heard the whistle.

Other witnesses were called: The young woman in the waggon, who only stated that they did not see or hear the train; and another witness, who saw the accident, but gave no particulars.

The witnesses for the plaintiff were of opinion the train was going from ten to fifteen miles an hour.

On the part of the defence, the conductor and the other persons in charge of the train were examined, and they all testified to the blowing of the whistle and the ringing of the bell before approaching the crossing: that they were not going more than five to seven miles an hour; that when they saw the plaintiff at the crossing they tried to stop but could not, but that they came to a stand-still seventy or eighty feet from the crossing, (which latter fact agreed with the evidence on the part of the plaintiff): that the train was passing that point on time, and a person coming to the track, as the plaintiff was, by looking out could have seen the train, the line of the railway being straight.

At the close of the case, *Harrison*, Q. C., for the defendants, moved for a nonsuit, on the ground that there was no negligence shewn on the part of the defendants, while there was contributory negligence shewn on the part of the plaintiff.

The learned Judge allowed the case to go to the jury, reserving leave to defendants to move to enter a nonsuit.

The jury found for the plaintiff, \$400.

In Easter term, 1873, *Harrison*, Q. C., moved accordingly.

During this term, *McMichael*, Q. C., shewed cause. There was evidently negligence on the part of the defendants, in allowing cars to remain on the siding, so as to prevent the plaintiff from seeing the main track, and the rule cannot be supported. As to contributory negligence, see *Bilbee v. Brighton and South Coast R. W. Co.*, 18 C. B. N. S. 584, and the language of Erle, C. J., at p. 592.

Harrison, Q. C., supported his rule. The plaintiff was guilty of contributory negligence. He was not blind or deaf, and he might, if he had chosen, have seen or heard the train. The bell was rung, and the whistle sounded, and he was aware that a train was to be expected about the time he was endeavouring to cross. He hesitated in driving across; if he had not done so, he would have escaped. The nonsuit is moved for on the whole case: *Campbell v. Hill*, 22 C. P. 526. See also *Adams v. The Inhabitants of Carlisle*, 21 Pick. 146; *Cliff v. Midland R. W. Co.*, L. R. 5 Q. B. 258; *Stubley v. London and North Western R. W. Co.*, L. R. 1 Ex. 13; *James v. Great Western R. W. Co.*, L. R. 2 C. P. 634, note; *Bellefontaine R. W. Co. v. Hunter*, 5 Am. Rep. 201; S. C. 33 Ind. 335; *Philadelphia and Reading R. W. Co. v. Spearen*, 47 Penn. St. 300; *Ernst v. Hudson River R. W. Co.*, 39 N. Y., 61; *Skelton v. London and North Western R. W. Co.*, L. R. 2 C. P. 631; *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R., 517; *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161; *Dascomb v. Buffalo & State Line R. W. Co.*, 27 Barb. 221, 226; *Wilcox v. Rome, Water-*

down, & Ogdensburgh R. W. Co., 39 N. Y. 358; *Butterfield v. Western R. W. Co.*, 10 Allen 532; *Winkler v. Great Western R. W. Co.*, 18 C. P. 250; *Nicholls v. Great Western R. W. Co.*, 27 U. C. R. 382; *Rastrick v. Great Western R. W. Co.*, 27 U. C. R. 396; *Adams v. Lancashire and Yorkshire R. W. Co.*, L. R. 4 C. P. 739.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that the rule to enter a nonsuit should be made absolute. The case of *Bilbee v. London, Brighton & South Coast R. W. Co.*, 18 C. B. N. S. 584, which was relied on by the plaintiff's counsel, is, we think, quite distinguishable from the case before us. We find, also, from observations made by the learned Judges, in several subsequent cases, that the courts do not consider that case an authority to the extent that it is generally cited.

In *Stubley v. the London & North Western R. W. Co.*, L. R., 1 Ex., at page 18, Bramwell B. says, as to *Bilbee's* case, "I need only say that I do not think we can treat it as an authority in point. I do not mean to say it was not rightly decided, but that it is no precedent. The Chief Justice, in the beginning of his judgment, guards against its being an authority for other cases, and bases his decision on the particular circumstances of the case."

And Channell B., in referring to it, says, at p. 19: "The decision does not conclude us, for it does not lay down any distinct rule." See, also, the observations of the Judges in *Cliff v. Midland R. W. Co.*, L. R. 5 Q. B. 258, and in *Skelton v. London and North Western R. W. Co.*, L. R. 2 C. P. 631.

As to the question of negligence on the part of these defendants, speaking for myself, I fail to see any evidence of it, unless it may be said that it was negligence in the company to allow cars to stand on the track near the crossing while the train in question was passing the station.

The main point, however, is, whether the case discloses contributory negligence on the part of the plaintiff. If it does do so, it becomes unnecessary to determine the ques-

tion or extent of negligence alleged against the defendants; for, as said by Cleasby B., in *Gee v. Metropolitan R. W. Co.*, L. R. 8, Q. B., at page 177, "Such a question (contributory negligence,) arises when both parties are substantially in fault, and when the fault of each contributes to the disaster. The rule was established before railways were made, and an illustration of it would be, one man driving furiously in the crowded streets of London, at fifteen miles an hour, and a man driving on his wrong side, not quite so furiously, perhaps, but still obviously in fault; and so both being in fault at the time, the fault of each having not exactly an equal share, but having a share in what took place, neither can recover, because both were clearly in fault."

In our judgment, the circumstances under which the accident complained of took place present a clear case of contributory negligence on the part of the plaintiff.

The case of *Skelton v. London & North Western R. W. Co.*, L. R. 2 C. P. 631, has a strong bearing on this case, particularly on that part of the evidence as to the cars standing on the siding, and which was urged so strongly by Dr. McMichael.

Bovill, C. J., in giving judgment, said, in this case, at p. 635, "The deceased could not have supposed that the position of the ring shewed that the line was clear, because the coal train was standing before the gate; and if the crossing was rendered dangerous by obstructions to the view, it only made it more incumbent upon him to take due care. There is no evidence, however, that the deceased took any care or caution whatever. When he reached the first line of the rails he could have seen 300 yards, but it appears from the evidence he did not look either to the right or left, but walked heedlessly on, and it was owing to this want of caution on his part that the accident happened. It is upon precisely similar grounds that Bramwell, B., bases his judgment in *Stubley v. North Western R. W. Co.*, L. R. 1 Ex. 13."

And Willes, J., said, at p. 636: "I am of the same opinion. I think that the evidence shews that if the

deceased had looked out he might have stopped in time and saved himself. * * * The Court is bound, in such cases as the present, to consider the question of contributory negligence in deciding whether there is any evidence to go to the jury of liability on the part of defendants."

And when we look at *Stubbley v. London & North Western R. W. Co.*, already referred to, we find Pollock, C. B., saying, at p. 16: "The railway runs in a straight line for hundreds of yards on either side of the place to which the deceased must come before crossing the line. It is in itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming."

Channell, B., said, at p. 19, "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended. And this ordinary care would be sufficient to prevent most accidents, and would in this case have prevented the accident; but the deceased forgot to take account of the possibility of the opposite side of the line being occupied by another train, which had been hidden from her by the passing luggage train."

Pigott, B., said, at p. 20: "I cannot help saying, that the deceased stepped into danger in a thoughtless way, and put herself in peril, and took the chance of what might be coming."

In *Cliff v. Midland R. W. Co.*, L. R., 5 Q. B., at page 264, Lush, J., says: "I think that where the Legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the Legislature intends that the persons who have to cross that line should take the risk incident to that state of things."

We also refer to the two cases in this Court of *Nicholls v. Great Western R. W. Co.*, 27 U. C. R. 382, and *Rastrick v. Great Western R. W. Co.*, 27 U. C. R. 396, as well as the case of *Winkler v. Great Western R. W. Co.*, 18 C. P. 250.

No case was cited by the plaintiff's counsel militating against the principles or rules laid down in these decisions.

These authorities are all applicable to the circumstances of the present case, and are based upon and consonant to good sense; and I must say that I should regret if we were compelled by authority to decide that the defendants were liable in a case of this kind.

The plaintiff owes to his own negligence the injuries he received. One cannot account for such negligence, or rather recklessness, except upon the ground that the plaintiff was regardless of the fact that he was crossing the railway, or, if his attention was drawn to it, that he approached it and crossed it at what he designated a moderate trot, risking his chance, without taking any precaution of ascertaining whether a train was approaching.

Can it be said that in such a case a company is to be held liable for his folly? We think not.

If the plaintiff had taken any precaution, by pulling up or looking out, he must have seen the train, and so avoided the accident; for, when he approached the rails, the train was within a short distance, and in a straight line, and from the direction he was driving giving him a better view than if the railway crossed the road he was travelling on at right angles.

As said in an American case, in Error, *The Pennsylvania R. W. Co. v. Beale*, 9 U. C. L. J., N. S., 299: "Collisions of this character have often resulted in the loss of hundreds of valuable lives,—of passengers on trains,—and they will do so again, if travellers crossing railways are not taught their simple duty, not to themselves only, but to others."

That case decides that it is evidence of contributory negligence if a person does not stop and look out for a locomotive before driving across a railway track.

I have also looked into the American decisions cited on the argument by Mr. Harrison, and although they are not authorities binding upon us, I find among them many able judgments, very instructive, and of much value in assisting one to arrive at a satisfactory conclusion upon the question of negligence and contributory negligence, in cases like this, as the mode and system upon which railways are

constructed and managed in the various states of the Union are more analogous to the railways in this country than those in England.

The principles and rules of law which guide the Courts in England are very ably discussed, and are applied to the peculiar and varying circumstances under which railways are chartered, constructed and managed in the different states; and, without going at length into the numerous decisions, I find the general principles which guide the Courts in cases like the one before us to be, that it is the duty of the traveller approaching a railway crossing to look along the line of railway track and see if any train is coming, and if he fails to take such precaution, and an accident happens, it is more than evidence of negligence in the traveller; it is negligence itself: that it is little short of recklessness for any one to drive on to the track of a railroad without first looking and listening to ascertain whether a moving locomotive is near; and that if a party rushes into danger which by ordinary care and prudence he could have seen and avoided, he cannot recover compensation for any injury he may receive: that while the omission of ringing a bell may be an act of negligence, a failure to do so does not *per se* raise the presumption that such omission was the cause of an injury: that, in general terms, a neglect of duty on the part of a railway company will not excuse a person approaching a crossing from using the senses of sight and hearing, where those senses may be available; and that when the use of either of these faculties would give sufficient warning to enable the party to avoid the danger, contributory negligence is shewn, and the company is not liable unless it has been guilty of such conduct as would show an intent or willingness to cause the injury, and that could only be attributed when the company has notice of the particular emergency in time, so that by the use of ordinary diligence and the power and means at hand the accident could be avoided.

On the whole, we are of opinion that the rule to enter a nonsuit be made absolute.

Rule absolute.

LINDSAY V. THE LANCASHIRE FIRE INSURANCE CO.

Fire Insurance—Different classes of goods—Separate insurance on—Statement of loss.

A policy of insurance on several different kinds of goods for separate amounts on each is, in effect, a separate policy on each class; and where such a policy required the assured to deliver "as particular an account of the loss and damage as the nature of the case would admit:" *Held*, he must give such account of the loss on each class of goods, and that a statement of loss upon his stock or merchandise, generally, was not sufficient.

ACTION on a fire policy.

The insurance was for \$2,000, apportioned as follows :—

On stock of dry-goods and clothing	\$14,00
On stock of groceries and crockery	400
On stock of boots and shoes	200

owned by the plaintiff, and contained in the two-story frame house, rough-cast, occupied by the plaintiff as a store in Orangeville.

The pleas were in denial of the policy; and that the plaintiff did not deliver as particular an account of the alleged loss and damage as the nature of the case would admit (being the language of the condition, which was set out in the declaration).

Issue.

The cause was tried before Galt, J., and a jury, at Barrie, at the Fall Assizes of 1873.

The material part of the evidence was as follows :—

The plaintiff was called on his own behalf. He said : "The loss was almost total, I had the means of ascertaining my loss from my books. They shewed that I had a stock of \$20,000, at the time of the fire. I arrived at this by taking the amount of stock on hand, as shewn by the stock books, on the 1st of April, 1872. The fire was on the 12th of February, 1873. I added the subsequent purchases. I deducted the amount of sales.

"The following statement is correct by my books. It shews a loss of \$6,341.18 :—

PARTICULARS OF CLAIM.

April 1, 1872.

To stock on hand\$ 8,360.80

Merchandise purchased since 29,087.72

37,448.52

Less :—

Merchandise sales from April 1, 1872,

to February 12, 1873..... 31,690.76

5,757.76

Add :—

Profit on sales from April 1, 1872,

25 per cent..... 6,338.15

\$12,095.91

Less :—

Goods saved from fire, per inventory.. 5,649.29

Butter 709.80

6,359.09

5,736.82

Add :—

12½ per cent. damages assessed on

goods, as per estimate 706.16

Butter 382.20

1,088.36

6,825.18

Less :—

Horse, \$100; cutter, \$30 130.00

Harness, \$20; scales, \$165 185.00

Stoves, \$40; machinery, \$60 100.00

Lamps, \$11; counter scales, \$13 24.00

1 Set of scales, \$16; shop furniture, \$29 45.00

484.00

\$6,341.18

“The present claim is for two-sevenths, amounting to \$1,811.76. I have no means of ascertaining particularly what goods I had on hand. The account of sales was kept

as a general merchandise account. The stock book would shew the different descriptions of goods. The invoices would shew what the purchases were, as regards the largest proportion. About one-fifth was bought for cash, for which I received no invoices. The ledger shews the account of goods purchased and sold. The cash, as received from day to day, we placed in the till, and at night the total amount was credited to merchandise account, without distinguishing the articles for which it had been received. After the loss, I made up the particulars of my claim (the one before stated). I gave notice to the insurance company. The inspectors of the insurance companies called; Mr. Henderson for the Provincial, and Mr. Campbell for the defendants. They desired me to have the goods saved put in order, that they might have them assessed. I did so. The goods were appraised by Messrs. Pringle and Eastman. In March, after the fire, I handed Mr. Campbell an informal statement, which shewed a loss of \$6,564.81. He said he would give me papers which I would have to fill up. He shewed me on the printed papers what I should do. I filled the papers up. I took them down on 31st of March, and gave them to Mr. Campbell."

The account is the same as before given.

The further particulars were as follows: They shew an insurance in the Provincial Insurance Company on a *stock of goods*, generally; and, in the Queen Insurance Company, on a *stock of merchandise*; and that at the time of the loss there were the following insurances on the goods:—

In the Provincial	\$3,000
In the Queen.....	2,000
In the Western	2,000
In the Andes.....	1,000
Besides that with the defendants.....	2,000

And that the property at the time of the fire was of the whole value of \$11,611.91.

"I asked Mr. Campbell if they would do. He said, Yes. The next day he said the company was prepared to settle

the claim, if the other companies would also settle. The other companies settled without much objection. I saw Campbell two or three weeks after. I asked him if there was anything additional in the papers which he required, and if it was necessary to give him an inventory of the goods saved. He said I might give him an inventory, and I did so. He afterwards said if he had known it was so voluminous he would not have required it. I gave him as particular an account as I could."

In cross-examination, he said, "The different descriptions of goods are distinguished in the stock book. I never made up the amount of each. Some of the invoices were burned. I did not apply to the parties from whom we bought for new invoices. I cannot tell the different quantities of the various goods which I had at the time of the fire. Mr. Campbell told me there was no necessity to go to a lawyer to fill up the papers; but to fill them up as he had told me. He appeared to be quite satisfied with them when I gave them to him. I never knew him to object to the particulars, but some time after he asked me if I could divide the stock. I don't think I saw him again. I did not look over the invoices, but I looked over the books."

On re-examination, he stated, "The greater portion of the invoices was destroyed. If I had had all the invoices and the stock books I could not have made out a more particular statement. It was after the other insurance companies had settled that Campbell required the classification of the goods."

James Haslett, the plaintiff's book-keeper, said he assisted to make up the statement of loss, and, in his opinion, the plaintiff could not have made up a more particular statement.

William Henderson said, "I am the inspector of the Provincial Company. I went to examine the plaintiff's books. All the companies had agreed that what I did would be accepted. That was after the informal statement was given in. I returned and reported that the books

were very well kept, and that the statement was correct, as shewn by the books. They were very well kept. I adjusted the loss with Mr. Lindsay, and the Provincial paid the adjustment. I don't think a retail merchant having a large cash trade could give a detailed statement. I thought the profits should have been taken at 20 per cent., in place of 25 per cent."

At the close of the plaintiff's case, the defendants' counsel moved for a nonsuit, on the ground that the policy required a more particular account than the plaintiff had furnished, and it was not a compliance with the condition, because it did not specify the loss on each description of goods insured.

The learned Judge overruled the objections.

The defendants' counsel then put in a letter from the defendants to the plaintiff, dated the 26th of May, 1873, as follows:—

"We beg to acknowledge having received from you on the 21st inst. an inventory of the goods saved from the fire, but are sorry you did not at the same time give us the value of the goods in stock at the time of the fire. We now repeat our request that you send us an estimate made up, as nearly correct as you can, of the value of the several classes of goods in stock at the time of the fire. Say value of dry goods, ready made clothing and millinery, \$—; of groceries and crockery, \$—; of boots and shoes, \$—; of hardware, \$—; and so on. Or, what would amount to about the same thing, an estimate, as nearly correct as you can give it, of the probable amount or value of *each* class of goods destroyed at the fire. As you are aware, we think the amount destroyed, as indicated by your general statement with the claim papers, too large; for, if we are correctly informed, it would appear that nearly all, if not all, the stock was taken out of the building before the building was destroyed. We have repeatedly called your attention to this point, and we have asked for a statement or estimate, as above, made out to the best of your knowledge and belief, of the several classes-of goods in stock at the

time of the fire, or else of those destroyed. Such statement or estimate will facilitate adjustment of your claim, and will oblige.

“Yours faithfully,
(Signed,) “W. CAMPBELL,
“Manager.”

The learned Judge told the jury that if the evidence satisfied them that the plaintiff did furnish as particular an account as it was in his power to do, then, in his opinion, they should find for the plaintiff.

The jury found for the plaintiff, with \$1,860 damages.

In Michaelmas Term *Patterson*, Q. C., obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground that the verdict was contrary to law and evidence, in this, that the evidence shewed that no particulars of loss upon the goods or different classes of goods insured were given; and because there was no evidence of loss on the goods insured to the amount of the verdict, or any amount; and for mis-direction of the learned Judge, in leaving it to the jury to say if the particulars proved were sufficient, instead of directing that they were not sufficient; and on grounds disclosed in the affidavit filed. The affidavit was made by Mr. Campbell, who stated he was not at the trial, and that he never accepted the account of loss rendered, nor gave the plaintiff to understand he did so; but, on the contrary, he pointed it out to the plaintiff as insufficient, giving no information of the extent of his loss, or of any loss upon the subjects of insurance under his policy with the defendants, although his account was not open to the same objection with respect to his policies from the other companies; and that both by letters to the plaintiff and by instructions to the local agent at Orangeville, the deponent did all he could to procure from the plaintiff some statement of his loss under the policy upon which he could base an adjustment, but he was unable to procure any statement except that given in evidence at the trial.

In this term *McCarthy*, Q. C., shewed cause. He read an affidavit of the plaintiff in denial of Campbell's, alleging, as he stated on the trial, that the account of loss was made on forms furnished by the defendants; and that Campbell did accept the account as fully satisfactory, and as being in full compliance with the policy; and that he never made any objection to the same until a considerable time after it had been furnished. He referred to the following cases to shew that the statement furnished was sufficient: *Banting v. The Niagara District Mutual Fire Assurance Co.*, 25 U. C. R. 431; *Norton v. Rensselaer & Saratoga Insurance Co.*, 7 Cowen 645; *Mason v. Harvey*, 8 Ex. 819; *Angell on Insurance*, 2nd Ed., sec. 239, and several following sections.

C. S. Patterson, Q. C., contra. The insurance being for several sums on different classes of goods, it is the same as if there had been a separate policy for each class of goods. A general statement of a loss upon merchandise or goods generally is not sufficient, as it does not shew there has been any loss upon the class of goods which was insured. The demand made on the 26th of May was reasonable, for without an account of the class of goods lost, it was impossible the defendants could know how to settle with the plaintiff. The cases clearly shew that the statement is insufficient. See *King v. Prince Edward County Mutual Insurance Co.*, 19 C. P. 134; *Carter v. Niagara District Mutual Fire Insurance Co.*, 19 C. P. 143; *Greaves v. Niagara District Mutual Fire Insurance Co.*, 25 U. C. R. 127; *Mulvey v. Gore District Mutual Fire Assurance Co.*, 25 U. C. R. 424; *Banting v. Niagara District Insurance Co.*, 25 U. C. R. 431; *McCulloch v. Gore District Fire Insurance Co.*, 32 U. C. R. 610.

WILSON, J., delivered the judgment of the Court.

The cases of *King v. Prince Edward County Mutual Insurance Co.*, 19 C. P. 134, and *McCulloch v. Gore District Mutual Fire Insurance Co.*, 32 U. C. R. 610, decide that a policy, such as the present, of three separate sums,

each sum being upon a distinct kind of goods, is in effect the same as if there were a separate policy for each sum upon the special class of goods.

The only account of loss and damage delivered to the defendants was the one produced at the trial. It shews the total of the *stock* on hand on the 1st of April, 1872; it shews the *merchandise* purchased since that day to the time of the fire; it shews the *merchandise* sales between those days; it shews the goods saved, *as per inventory*, in which a full description of the goods is given; and it shews damages assessed on goods, *as per estimate*, which estimate I have not seen, and do not know whether it specifies the kind of goods properly or not.

The issue was, whether the plaintiff did or did not deliver to the defendants "as particular an account of the loss and damage as the nature of the case would admit."

The insurance was on stock,—

Of dry-goods and clothing.....	\$1,400
Of groceries and crockery.....	400
And of boots and shoes.....	200

The account delivered, that so much *stock* or *merchandise* was on hand before the fire, and so much of it was sold, leaving so much after the fire, does not shew a particular account of the loss which is of the slightest service to the defendants. They want to know if any dry-goods or clothing, or groceries or crockery, or boots or shoes were lost or damaged; and the declaration that the plaintiff lost *stock* or *merchandise* is not an answer, for there may not have been a single article of the special nature of the goods which the defendants insured lost or damaged, and it may yet be perfectly true that the plaintiff lost all the merchandise which he says he lost. He may be a loser, but he may have no claim on the company. The company have nothing to do with his loss, excepting as it affects them; and to tell them of his loss without shewing that it affects them is quite useless.

The company are also entitled to know the amount of

loss claimed on the articles which are covered by the different sums.

The plaintiff may have claimed \$1,811.76 from the defendants, but he may have lost the whole of that upon boots and shoes, and he can only recover \$200 in respect of them; or he may have lost the whole of it upon groceries and crockery, and he can only recover \$400 in respect of them.

It is impossible he can compel the defendants to pay upon a gross account of so much *merchandise* lost or damaged, when the defendants are not insurers upon his general stock, but upon particular portions of it, and for particular sums upon each distinct portion.

The cases referred to are precise and satisfactory upon the point, and they require that much more particularity shall be observed than has been asked for from the plaintiff.

The defendants' letter to the plaintiff of the 26th of May, which was put in at the trial, was not answered or rebutted by the plaintiff, and there it is distinctly charged that the defendants had "repeatedly called your attention to this point, and have asked for a statement or estimate, as above, made out to the best of your knowledge and belief, of the several classes of goods in stock at the time of the fire, or else of those destroyed." And that letter was written only five days after the plaintiff delivered in his inventory of the goods saved.

We attribute more weight by far to such a document, never answered nor contradicted, than it is possible to do to the verbal statements of the plaintiff, that Mr. Campbell said the account delivered would answer, and that he appeared to be satisfied with it, and he never objected to it, and he did not ask the goods to be classified till after the other insurance companies had settled with the plaintiff.

But the plaintiff is not bound to furnish absolutely a particular account of his loss; he is only obliged to deliver as particular an account "as the nature of the case would admit."

Has he done that? He said he had the means of ascertaining his loss from his books by taking his stock on hand, as appeared by his stock book on the 1st of April, 1872, and adding to it his subsequent purchases, and deducting from it his sales. By doing so, he shewed his stock on hand at the time of the fire to be about \$12,000 : yet he had just sworn that his stock at the time of the fire was \$20,000,—a discrepancy in no way explained.

He also said, "The stock-book would shew the different descriptions of goods ; the invoices would shew what the purchases were, as regards the largest proportion." In cross-examination, he said, "The different descriptions of goods are distinguished in the stock-book. I never made up the amount of each. Some of the invoices were burned ; I did not apply for new ones."

He further said, on cross-examination, "I cannot tell the different quantities of the various goods which I had at the time of the fire. * * * I did not look over the invoices, but I looked over the books."

In re-examination, he said, "The greater portion of the invoices was destroyed. If I had had all the invoices and the stock-books, I could not have made out a more particular statement."

I do not think the plaintiff's evidence is very clearly given. First, he says he had the means of ascertaining his loss from his books by taking his stock on hand on the 1st of April, 1872; and that the stock-book would shew the different descriptions of goods. And, secondly, he says he cannot tell the different quantities of the various goods he had at the time of the fire, and if he had had all the invoices and the stock-books he could not have made out a more particular statement.

What I suppose he means is, that he could tell what his *general* loss was from his books, but he could not tell the quantity of *each particular class of goods* he had at the time of the fire from his books, because the account of sales was kept as a *general merchandise account*, and did not distinguish the particular articles which were sold.

What the value of books is I do not know, if they do not enable one to tell, in a trade of dry-goods and boots, what amount of dry-goods the trader has on hand at any particular time, and what amount of boots; or, at any rate, if they do not enable him to make an approximate estimate, or to form a belief, or even a guess about it. And of what value can that evidence be, which was given, that the plaintiff's books were very well kept, in the face of the declaration of the plaintiff himself, that with "all the invoices and the stock-books, I could not make out a more particular statement" than that he had lost \$6,341.18 of *merchandise*.

It appears to me incredible that such a thing can be true. The plaintiff must have had some idea, or have had some means of forming an estimate from his books and invoices, or from his purchases and sales, or from the appearance even of his shop, what kinds of goods he had on hand just before the fire, and their quantity or probable quantity.

He must have given evidence at the trial that he had lost a certain quantity of dry-goods and clothing, and of the other articles specially insured, before the jury could have awarded him anything upon each of the different classes. If he gave such evidence, although I do not see one word of it in the notes of the trial, he should also have embodied it in his statement of loss.

The condition is one which it is incumbent upon him to perform; he has in no respect performed it. The defendants are acting most reasonably in this case. They do not believe the goods were lost at all, and there is the more cause they should have the statement of the nature they stipulated for.

There is no entry of any objection to the charge having been taken, but we think there must be a new trial without costs.

Rule absolute for new trial.

ELIZABETH ANN SHEERMAN, (Administratrix of Isaiah Sheerman), v. THE TORONTO, GREY, AND BRUCE RAILWAY COMPANY.

Railway—Carriage of contractor's workmen on gravel train—Liability of R. W. Co.—Amendment at trial—Demurrer.

Declaration: That I. S. (husband of the plaintiff) was a servant and workman employed by certain contractors with defendants in ballasting defendants' railway, and in performing such work certain cars and engines under the guidance and management of defendants' servants were used for the transport of materials and the conveyance of workmen employed by the contractors, said workmen not being servants of the defendants, to and from their residence and their work, *for reward to the defendants*; and that I. S. in his lifetime, being such workman, became a passenger on a car drawn on said railway by a locomotive under the defendants' management, to be carried from his place of work home, and as such workman and passenger then was lawfully in and on said car, yet the defendants so negligently managed the train, &c., that I. S. was injured thereby, and by reason thereof died.

Pleas: 1. Not guilty, by Statute. 2. That the train was not used for conveyance of said workmen for reward to the defendants as alleged, and I. S. was not lawfully on said train.

The words, "for reward to defendants" having been struck out of the declaration at the trial, the defendants demurred to the declaration, and the plaintiff demurred to the second plea.

Held, declaration good, for it shewed that the train under the management of the defendants was for the purpose of carrying materials and the contractors' workmen, and alleged that I. S. was lawfully thereon, and a sufficient consideration, if any were necessary to be averred, was shewn.

Seemle, That it is not proper to allow amendments at the trial, which end, or must end, in a demurrer.

At the trial the evidence shewed that the defendants were only bound by their contract with the contractors to provide an engine and platform cars for carrying ballasting and materials for track-laying, to be under the charge of their own conductor, engineer, and fireman, the contractors to find the brakemen; and that it was not necessary for defendants to carry the workmen. There was no evidence that the defendants consented to the use of the cars by the men, further than that the conductor and engine-driver permitted it.

Held, that I. S. was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed.

Seemle, that the deceased could not have been considered a fellow servant with those employed by the defendants.

ACTION by Elizabeth Ann Sheerman, administratrix of Isaiah Sheerman, against the Toronto, Grey, and Bruce Railway Company, for damages for herself and four children from the death of her husband Isaiah Sheerman, caused, as alleged, by defendants' negligence.

Declaration: that the said Isaiah Sheerman was a servant

and workman in the employment of certain contractors, to wit, W. Mackenzie and J. Shedden, with the defendants, for the construction and ballasting of the defendants' railway, and in performing the work necessary for such construction and ballasting certain cars and engines, under the guidance and management of defendants' servants, were used for the transport of materials and the conveyance of the workmen employed by the said contractors, the said workmen not being the servants of the defendants, to and from their residences and to and from the place of their work *for reward to the defendants*; and that the said I. S., in his lifetime, so being a workman in the employment of the said contractors, to wit, on the 31st of October, 1872, became and was a passenger on a car drawn and propelled on and along the said railway by a locomotive engine under the management and guidance of servants of the defendants, to be carried upon the said railway from the place of his work on the said railway to the place where he resided, to wit, the town of Owen Sound, in the county of Grey, and as such workman and passenger then was lawfully in and on the said car; yet the defendants did not by their servants safely and securely convey the said I. S. upon the said railway on the said journey, but so negligently and unskilfully conducted themselves in and about the carrying the said I. S., and in the management of the said car and locomotive and the train to which the said car was attached, that the said I. S. was thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said I. S. afterwards and within twelve calendar months first before this suit died.

At the trial the declaration was amended by striking out the words "for reward to the defendants."

Pleas: 1. Not guilty, by statute, Consol. Stat. U. C. ch. 66, sec. 83; Stat. of Ontario, 1867-68, ch. 40. 2. That the said cars and engines were not used by and with the defendants' consent for the transport of materials and the conveyance of the workmen employed by the said con-

tractors to and from their residence, and to and from their place of work, for reward to the defendants as alleged, and the said Isaiah Sheerman was not at the time of the alleged injury lawfully in and on the said car as alleged.

Issue.

The words "for reward to the defendants" having been struck out at the trial, the defendants demurred to the declaration, on the grounds:—1. That the plaintiff's cause of action is founded upon contract, and that there is no contract stated or alleged between the said Isaiah Sheerman and the defendants to carry the said Isaiah Sheerman on the defendants' railway. 2. That there is no consideration shewn for the carriage by the defendants of the said Sheerman. 3. That the contract alleged to have been made by the defendants with the contractors could not enure to the benefit of the said Isaiah Sheerman or the plaintiff, so as to enable him or her to bring this action against the defendants. 4. That it is not alleged or shewn that the contract between the contractors and the defendants was continuing at the time of the alleged injury, or that the said Isaiah Sheerman, at the time of the alleged injury, was being carried by the defendants in pursuance of such contract, or of any contract.

The plaintiff also demurred to the second plea, because:—1. The said plea tenders too wide an issue; 2. That the said plea takes issue upon matters not alleged in the declaration; 3. That the said plea tenders an immaterial issue.

Joinder.

The cause was tried at the Fall Assizes, at Owen Sound, before Morrison, J., when the jury found a verdict of \$2,000 for the widow, and \$1,200 for the four children.

In Michaelmas Term last, *Lash* obtained a rule nisi, calling on the plaintiff to shew cause why a nonsuit should not be entered on the leave reserved, or a new trial granted, the verdict being against law and evidence, and the weight of evidence, and for misdirection of the learned judge—

the misdirection being that he told the jury that if there was negligence in the management of the train, the defendants would be liable for the consequences, while he should have told the jury that under the circumstances there was no duty cast upon the defendants to carry the deceased.

Harrison, Q. C., obtained a rule on behalf of the plaintiff calling on the defendants to shew cause why the words in the second plea, "for reward to the defendants," should not be struck out, and why on the plea being so amended the verdict should not be entered for the plaintiff on the issue joined on that plea; or why a new trial should not be granted, because the verdict on that issue was contrary to law and evidence, and the weight of evidence; or why a repleader should not be awarded, or such other rule or order made as to the Court might seem meet.

In this term, *Robinson*, Q. C., and *Harrison*, Q. C., for the plaintiff, argued the demurrers and cross rules together.

As to the demurrer. The action is in case, and not in contract, and the statement of a reward to the defendants for the conveyance of deceased is not necessary. The facts stated in the declaration shew that the deceased was properly using the cars, and under circumstances from which the assent of the defendants must be implied. The deceased was plainly not a trespasser or wrong-doer on the train. The contractors and their servants were carrying on a work for the defendants, in which all parties were jointly interested, and in which the engine, cars, and train were required and had to be used; and the defendants were in the charge and management of the train by their own immediate servants.

If a consideration be necessary to be stated, sufficient appears on the declaration to constitute a good consideration for the carriage of deceased on the cars by defendants, because it appears the deceased was employed by the contractors, who were acting for the defendants; and that the cars and engine were under the control of the defendants, and were used for the transport of materials and the carriage of the workmen, the deceased being one of them,

and the contractors had the use of the train as a part consideration for their work—and the deceased was not a fellow workman : *Torpy v. The Grand Trunk R. W. Co.*, 20 U. C. R. 446. The following cases were cited :—

The Great Northern R. W. Co. v. Harrison, 10 Ex. 376 ; *Martin v. The Great Indian Peninsular R. W. Co.*, L. R. 3 Ex. 9 ; *Austin v. The Great Western R. W. Co.*, L. R. 2 Q. B. 442, 445 ; *Marshall v. The York, Newcastle, and Berwick R. W. Co.*, 11 C. B. 655 ; *Collett v. The London and North Western R. W. Co.*, 16 Q. B. 984 ; *Lygo v. Newbold*, 9 Ex. 302 ; *Chitty on Contracts*, 8th ed., 465 ; *Angell on Carriers*, 4th ed., sec. 562 ; *Alton v. The Midland R. W. Co.*, 19 C. B. N. S. 213 ; *Redfield on Carriers*, sec. 343 ; *Shearman & Redfield on Negligence*, 2nd ed., secs. 38, 39, 40 ; *Redfield on Railways*, 4th ed., vol. i. p. 603, vol. ii. 210 ; *Philadelphia and Reading R. W. Co., v. Derby*, 14 Howard 468 ; *Fenton v. The City of Dublin Steam Packet Co.*, 8 A. & E. 835 ; *Schuster v. McKellar*, 7 E. & B. 704 ; *Dalyell v. Tyrer*, E. B. & E. 899 ; “*The Queen*,” “*The Lord John Russell*,” L. R. 2 Adm. 354 ; “*The Royal Charter*,” L. R. 2 Adm. 362 ; *The Liverpool Brazil, and River Plate Steam Navigation Co., (Limited) v. Benham, The Halley*, L. R. 2 P. C. 193 ; *Moss v. The African Steamship Co., The Calabar*, L. R. 2 P. C. 238 ; *Mitchell v. Crassweller*, 13 C. B. 237 ; *Patten v. Rea*, 2 C. B. N. S. 606 ; *Whatman v. Pearson*, L. R. 3 C. P. 422 ; *Storey v. Ashton*, L. R. 4 Q. B. 476 ; *Burns v. Poulson*, L. R. 8 C. P. 563 ; *Vars v. Grand Trunk R. W. Co.*, 23 C. P. 143.

M. C. Cameron, Q. C., and *Lash*, contra. There is no case conflicting with *Lygo v. Newbold*, 9 Ex. 302. If that case were decided on the ground of contributory negligence then there was contributory negligence here by the deceased getting on the train. *Austin v. Great Western R. W. Co.*, L. R. 2 Q. B. 442, is a decision in favor of the defendants, because there the mother of a child which was two months over the age of three years, under which age no charge was made for children, was held to have made a contract for the benefit of the child ; the child having been

received on the cars without fraud or wrong on the part of the mother, and with the assent of the company. But it could not be assumed here that the deceased was on the construction and ballasting cars for the purpose of his being carried with the assent of the defendants, merely because he was a servant of the contractors. Several of the cases cited are also in favour of the defendants. The allegation of reward should have been made it was a material averment. The declaration is defective for want of it. The only remedy against a common carrier for not carrying safely, is by reason of the contract: *Alton v. The Midland R. W. Co.*, 19 C. B. N. S. 213. The case of *Torpy v. The Grand Trunk R. W. Co.*, 20 U. C. R. 446, does not decide that such a declaration as the present is good, without the consideration of reward; but that a reward sufficiently appeared in the declaration in that case. The contract here, if one can be inferred, cannot give a cause of action against the defendants, because the conductor or engineer had no power with respect to such a train, to make a contract for the carriage of any one so as to bind the defendants.

If the defendants are liable at all, it can only be for gross negligence. *Moffatt v. Bateman*, L. R. 3 P. C. 115; but there are no facts stated in this count to warrant such a charge against the defendants; *Giblin v. McMullen*, L. R. 2 P. C. 317. These cases shew that carrying for profit does not mean for money or for profit, in the ordinary sense of the word.

Robinson, Q.C., in reply, referred to a case, *Lawrenceburg and Upper Mississippi R. W. Co. v. Montgomery*, 7 Ind. 474, as being similar to the present, cited in *Redfield on Railways*, 4th ed. vol. ii. 233, note; *Shearman & Redfield*, 2nd ed., 264; *Watson v. The Northern R. W. Co. of Canada*, 24 U. C. R. 98; *Grill v. The General Iron Screw Collier Co., (Limited)*, L. R. 1 C. P. 600, 612; *Robertson v. The New York and Erie R. W. Co.*, 22 Barb. 91.

The authorities referred to on the argument of the rules are all stated in disposing of the demurrer, and therefore are not

repeated, nor is the evidence commented on set out, as sufficient appears in the judgment upon the rules for the purposes of the report.

WILSON, J., delivered the judgment of the Court.

This seems really to be a case brought before us for testing the correctness of the decision in *Torpy v. The Grand Trunk R. W. Co.*, 20 U. C. R. 446 ; because the second count, which was there demurred to, appears to have been the precedent from which the count in the case before us was drawn, excepting as to the allegation for reward, which was not averred in that case, and which was at first in the count in the present case, but which was afterwards struck out, so that at present the two counts are in precisely the like form.

And the Court held that the count disclosed a good cause of action.

The only difference between the two counts is, that the one in this case avers that the deceased, "as such workman and passenger then was lawfully in and on the said car," which makes the decision of the other case more strongly an authority for the sufficiency of this count.

It must be very difficult to avoid coming to any other conclusion than the one in the case to which we have been referred, even if we are now to re-examine and review it, because the count expressly states that the train, although for the use of and used by the contractors in constructing and ballasting the road for the defendants, was under the guidance and management of the defendants' servants, and was used for the transport of materials and the conveyance of the workmen employed by the contractors, of whom the plaintiff was one, yet the defendants by their servants so negligently conducted themselves in the management of the train that Sheerman was killed ; and that which was inference only in the other case, that the person injured was lawfully on the cars, is here matter of express averment.

Then the facts simply are, that a train under the defen-

dants' management is so negligently managed that injury results to a person lawfully upon the train at the time of the accident, and who shews he was lawfully there because he was using it for the purpose for which it is averred it was to be applied. Does this statement afford a cause of action for the injury sustained against the company? I cannot at present understand how it does not.

The defendants contend that the count is bad, because it shews the contractors were to do the construction and ballasting of the road, and in performing *that work* the train, although used under the management of the defendants' servants to carry the materials and the contractors' men, was supplied by the defendants only for the specific work of construction, and not for the carriage of workmen; and however that may be that the train, though under the management of the defendants' servants, was nevertheless under the immediate direction and control of the contractors, who are alone responsible for all mismanagement, and that as between the contractors and the deceased he may have been lawfully upon the train at the time in question, but he was not there lawfully as respects the defendants. And that is the substantial question.

That was the question in *The Great Northern R. W. Co. v. Harrison*, 10 Ex. 376. The plaintiff was admitted to the cars upon a ticket furnished by the company to reporters of the press. His name was not on the ticket, as it was said it should have been, but the name of another person was on it, and it was marked "not transferable." There was evidence that on such tickets other persons than those whose names were on the tickets were at times permitted to travel, so long as such persons belonged to the same paper as the person whose name was on the ticket. The plaintiff shewed the ticket he had to the officer, who said it was all right, and he took his seat in the car in good faith, believing he had the right to be there. It was held on these facts that the plaintiff was not a trespasser on the car, and if he had subjected himself only to the payment of fare, or a higher fare, if he were wrong in using the ticket,

he would still not be a trespasser, and would be entitled to recover for an injury arising by the negligence of the company.

Austin v. The Great Western R. W. Co., L. R. 2 Q. B. 442, is upon a like point. The mother of a child, the child being a little above three years of age, under which age it was exempt from fare, took a ticket for herself and none for the child. The child was injured. Held, the child could recover for the injury against the company. There was a contract to carry both mother and child safely, and even though the mother misrepresented the age of the child, that would not prevent a recovery for injury to the child by the negligence of the company. The mother may be liable over for the fare she should have paid for the child, or for any other penalty her conduct subjected her to. If the plaintiff had been there by fraud, or not with the defendants' assent, he could not recover.

The case of *Lygo v. Newbold*, 9 Ex. 302, seems well decided. There the plaintiff agreed with the defendant to carry certain goods for her in the defendant's cart. The defendant sent his servant with the cart, and the plaintiff, by permission of the servant, but without the defendant's authority or knowledge, rode in the cart with her goods. The cart broke down, and the plaintiff was thrown out and injured. Held, the defendant not having contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the injury she had suffered.

Collett v. The London and North Western R. W. Co. 16 Q. B. 984, was the case of a Post Office officer traveling with the mails on the train being injured. A duty to carry the mails was alleged, and it was also stated that the Postmaster-General had reasonably required the defendants to carry the plaintiff with the mails, and they did so, and that the defendants did not safely carry the plaintiff. Held, it was the duty of the defendants toward the plaintiff to carry him safely; it was not a matter of contract between them.

One who drives another gratuitously is not liable for an injury to the other in the course of the journey by mismanagement or neglect, unless there be *gross negligence*, which is the kind of default which renders a gratuitous bailee liable: *Moffatt v. Bateman*, L. R. 3 P. C. 115.

In *Fenton v. The City of Dublin Steam Packet Co.*, 8 A. & E. 835, the defendants were liable for sinking plaintiff's vessel by their boat, because, although they had chartered their vessel, they furnished the crew and so had the control of the vessel, the crew being their servants although the charterers paid the crew. See also *Schuster v. McKellar*, 7 E. & B. 704, 724.

The owner is not liable for an injury attributable solely to a licensed pilot, which the owner is bound to take on board: *The "Queen," The "Lord John Russell,"* L. R. 2 Adm. 354; *The "Royal Charter,"* L. R. 2 Adm. 362; *The "Iona,"* L. R. 1 P. C. 426; *The Liverpool, Brazil, and River Plate Steam Navigation Co., limited, v. Benham, The "Halley,"* L. R. 2 P. C. 193.

But if the mischief is attributable to neglect of the master or crew, or if their conduct conduced to the mischief, the owner is liable although the ship is under the charge of the pilot. See the cases last cited.

Dalyell v. Tyrer, E. B. & E. 899, is also an important case. H., the lessee of a ferry, hired from defendants for one day a steam tug and crew, to assist in carrying his passengers across. H. received the fares, and defendants were paid by him for the hire of the tug; they sent and paid the crew. Plaintiff was a passenger on the tug, and was injured by the negligence of the crew by some of the tackle breaking. Held, the defendants were liable for the negligence, although it might be that H. was also liable.

Erle, C. J., said, at p. 905, "The defendants were liable. They were by their crew in possession of the vessel; and I am of opinion that, if the negligence in question had injured a mere stranger, not on board, but standing, for instance, on the pier at the time, they would have been liable."

Hill, J., said, at p. 906, "The crew of the steam tug were the servants of defendants. They had hired and paid them, had entire control over them, and had power to substitute others in their place; and the defendants had also power to add to or to alter any portion of the tackle of the vessel. They were, therefore, responsible for any negligence of the crew, or failure of the tackle."

If a servant do an act within the scope of his employment, although against the orders of his master, and injury result from it to another, the master is liable: *Whatman v. Pearson*, L. R. 3 C. P. 422. But if he so far deviate from his course that he is not doing anything in the course of his employment, but contrary to it, the master is not liable: *Mitchell v. Crassweller*, 13 C. B. 237; *Storey v. Ashton*, L. R. 4 Q. B. 476.

Of course, whenever he is acting within the general business of his employment, although he is not acting strictly up to it, the master is liable: *Burns v. Poulson*, L. R. 8 C. P. 563.

Or even when the servant is attending partly at the time to his own business: *Patten v. Rea*, 2 C. B. N. S. 606.

The effect of these cases is, that the declaration, which asserts the cars and engines were under the guidance and management of the defendants' servants, must be considered as having been worked by the defendants for the purpose for which it appears the cars and engines were given to be used and were used. That purpose is declared to have been for the transport of materials and the conveyance of the contractors' workmen. And for the purpose of determining the sufficiency of the declaration that statement on the demurrer must be taken to be true, and it does shew a control over the engines and cars by the defendants; and that the deceased having been on the train, was there according to the purpose for which the train was to be used—lawfully there, as it is expressly averred he was, and with the assent of the defendants.

That being so, the defendants were not performing a merely voluntary and gratuitous service, and the deceased

was not receiving a mere favour and obligation, but he was there while his claim to be carried was not disputed as of right. He was not there by fraud, nor as a trespasser, he was not, (on this question of demurrer) knowingly violating in the use of the car the purpose for which the defendants say it was only to be used; and he was, therefore, entitled as a matter of duty to be carried safely and securely by the defendants.

Several of the cases before mentioned are expressly in favour of the plaintiff.

If it be necessary that a consideration should appear on the face of the declaration for the right which the deceased claimed to be upon the train at the time of the injury, we think there is quite sufficient consideration appearing to support it: *Collett v. The London and North Western R. W. Co.*, 16 Q. B. 984; *Torpy v. The Grand Trunk R. W. Co.*, 20 U. C. R. 446; *The Great Northern R. W. Co. v. Harrison*, 10 Ex. 376; *Marshall v. The York, Newcastle, and Berwick R. W. Co.*, 11 C. B. 655. See *Redfield on Railways*, 233, note.

We hold the declaration to be sufficient.

Judgment must be given for the plaintiff on the demurrer to the declaration.

As to the principal portion of the second plea, denying the reward contained in the count, the traverse offered is immaterial, because there is no allegation now of reward. There must therefore be judgment as to it for the plaintiff also.

As to the residue of the plea, that the deceased was not lawfully on the car as alleged at the time of the injury, we should probably have held that an independent traverse, and have given judgment for the defendants as to it; but we do not think it worth while to divide the plea, as the defendants have already the full benefit of that traverse under the general issue by statute.

I believe the rule is not to make amendments at *nisi prius* which end, or must end, in a demurrer. The purpose of an amendment is to permit a trial to go on, and

that is not answered by a demurrer being put in. The Judge at *nisi prius* has no power to receive a demurrer. Here, after the amendment was made, there was still an issue to try upon the unlimited plea by statute of not guilty. And in that way the trial effectually proceeded; and the demurrer, though not strictly receivable there, would have been afterwards allowed to be added.

There remain now the rules to be disposed of.

I have read the evidence given at the trial, and the contract between the defendants and the contractors; and from the evidence and contract it appears that the defendants were, for the purpose of enabling the contractors to do the ballasting and track-laying, to furnish them with one locomotive and fourteen platform cars at each ballasting pit.

The contract declares:—"The train will be in charge of a conductor appointed by the company, whose own engineer and fireman will run the locomotive, but brakemen will be found and paid by the contractors. And one locomotive and platform cars will be provided for carrying materials for track-laying on similar conditions. Provided the company shall not be required to provide more than three engines and forty-two cars altogether."

There was no evidence to shew that the defendants consented to the use of the cars by the contractors' workmen, unless so far as the knowledge of the conductor and his consent and that of the engine driver can be considered the consent of the defendants.

The evidence of Mr. *McKenzie*, one of the contractors, was that "the defendants' inspectors had only to see that the work was done by us, nothing more, and the engineers the same. They had nothing to do as to our putting the men on the cars; we did that as we thought fit, and our using the cars for the men was our own action only."

And it appeared it was not necessary the defendants should carry the men to and from their work; and that they never agreed to do more than to provide cars for carrying ballasting and materials for the track-laying.

If it had appeared that it was usual and proper the men should be so carried, or that it was absolutely necessary they should be carried on the train, as in the case of the brakesmen, the defendants would, I think, be responsible for the safe conveyance of the workmen, unless they would be exempted on the ground of such workmen being the fellow workmen of all those who were engaged in the performance of a common work.

The latter ground probably could not be relied on by the defendants, because the deceased was not in the employment of the defendants at all, nor under their control: *Warburton v. The Great Western R. W. Co.*, L. R. 2 Ex. 30.

The deceased never ran the risks from those persons the defendants employed, for he had nothing to do with the defendants, nor their workmen. He ran the risks from those only who were the employees of the contractors.

I think it would be imposing an unreasonable burden upon the defendants to hold them liable for injuries done to such men who go on the cars of their own motion, by leave of the contractors, when the defendants have furnished cars simply and exclusively for the carriage of ballasting and materials for laying the track to the contractors to enable them to do the work, especially when it is not shewn to have been absolutely necessary, in the carriage of such materials, that some of the contractors' men should also be upon the cars in the ordinary performance of their work.

There is nothing from which a consent of the defendants can be presumed to carry the workmen of the contractors. The contrary expressly appears, because it was against the purposes for which the cars were to be used, and for which they were lent or furnished.

That the conductor or engine-driver allowed the men to ride upon the cars was an act of good nature on their part; but it did not transfer the risks of the journey, by negligence of those servants of the defendants who were in charge, or from deficiencies of the road or of the cars, from the workmen, who voluntarily and unauthorizedly, so far as the defendants were concerned, got upon the cars,

to the defendants, who never consented they should be upon them.

The workmen were not lawfully on the cars. They were not passengers being carried by the defendants. They were acting at their own risk—not at the risk of the defendants; and, however unfortunate this disaster may have been, it is only right the legal responsibility should fall upon those who ought to bear it, and not upon those on whom it does not rest.

The learned Judge left the case fairly to the jury, if it had to go to the jury at all.

But as leave was reserved to enter a nonsuit, we are of opinion the nonsuit should now be entered as it might have been at the trial.

I was not aware until after I had formed my opinion upon what the result of the rules should be, and until after I had disposed of the demurrer, that a similar case was pending in the Common Pleas (*a*). I have since heard how it has been disposed of, and I feel strengthened in the conclusion I have come to by the opinion of that Court upon similar pleadings and evidence, and with respect to an accident happening at the same time, and by the same train, to another workman of the contractors of the defendants.

As we are of opinion the second plea is bad in law, and judgment has been given against it on demurrer, it is not necessary to deal with it according to the rules any further.

The plaintiff's rule will be discharged, and the defendants' rule will be made absolute to enter a nonsuit on the leave reserved at the trial.

Rules accordingly.

(*a*) *Graham v. Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 541.

BLAIR AND BROCKLEBANK v. ELLIS.

Assignment of debts.

B. assigned to his partner and to himself a debt due from the defendant to himself for goods sold, &c.

Held, that under 29 Vic., ch. 28, and 35 Vic. ch. 12, O., B. and his partner could sue for this debt in their joint names.

DECLARATION: 1. The common counts; 2. For money payable by defendant to plaintiffs, as assignee of William Brocklebank, for goods sold and delivered by the said William Brocklebank to the defendant, &c., and on an account stated, concluding, "which said claim was assigned by the said William Brocklebank to the plaintiffs by deed, bearing date the 18th day of December, 1872."

The defendant did not plead.

The action was commenced by an attachment under the Insolvent Act, dated 19th December, 1872. It appeared the defendant had left the country.

The cause was tried at the last Assizes, at Walkerton, before Wilson, J.

The action being under the Insolvent Act, it was necessary to prove the amount of the plaintiffs' claim.

A partnership account for hardware, sold by them to the defendant, amounting to \$243.46, was proved. It appeared on the trial that the plaintiffs became partners in the hardware business in March, 1872, and so continued ever since. The plaintiff Brocklebank, in July, 1872, sold some timber belonging to himself to the defendant. The value of the timber so sold, with the charge for hauling it, amounted to \$98.03. The day before the commencement of this action, he assigned that claim to the plaintiffs as partners.

The assignment, under seal, was put in, and was as follows:—

"Know all men by these presents that I, William Brocklebank, of * * in consideration of the sum of \$90 to me paid by James Blair * * and William Brocklebank, trading at said town of Walkerton, under the name, style, and firm of James Blair & Co., merchants, the receipt whereof is hereby acknowledged, have sold and by

these presents do sell, assign, transfer and set over unto the said J. B. & W. B., trading as aforesaid, a certain debt due me from Alexander Ellis, amounting to \$98.03, for goods sold and delivered by me to the said Alex. Ellis, the particulars of which are annexed, * * with full power to sue for, collect and discharge, sell and assign the same, either in my name or in their own names, but at their own costs and charges. In witness whereof I have hereunto set my hand and seal this 18th day of December, 1872.

“WM. BROCKLEBANK. [L.S.]”

The learned Judge thought it might be a question whether, under the assignment, the plaintiffs were co-partners so as to enable them to join this claim with one in an action for goods sold by them, and, as the defendant was not present at the trial, and there were creditors who were interested, he did not give a verdict for the \$98.03, but for \$243.46, giving leave to the plaintiffs to move to add the \$98.03 to the verdict, if the Court should think them entitled to it.

In Easter Term *C. Robinson*, Q. C., obtained a rule *nisi* to increase the verdict by the said sum of \$98.03, with interest, or by such sum as the Court might think proper, pursuant to the Law Reform Act, and leave reserved, and that the rule *nisi* might be served on the wife of the defendant if at the time of the service she were living at Walkerton, &c.

The rule was served on the defendant's wife in Walkerton, on the 22nd May.

During the same term *C. Robinson*, Q. C., moved the rule absolute. No doubt the practice in assigning property so as to vest it in an old and new trustee in England, before the statute 22 & 23 Vic., ch. 35, was, for the old trustee to assign it to a third person, in trust to assign it to the continuing and the new trustee as joint tenants, who re-assigned accordingly. The words of the Imperial statute, sec. 21, and our own, 29 Vic., ch. 28, sec. 19, are the same, viz., “Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or corporation,

by the like means as he might assign the same to another." It may be said that a debt, though personal property, was not when that Act passed "by law assignable," but the assignment of debts was allowed and recognized at law, though the assignee, until the passing of our 35 Vic. ch. 12, O., was obliged to sue in the name of the assignor. By that Act he can now sue, and the plaintiffs' right to recover seems therefor complete. See *Leith's Real Property Acts*, 19, 20; *Young v. Hughes*, 4 H. & N. 76, 84; *Chitty's Statutes*, vol. i., 831; *Sanders on Uses*, 4th ed., 130; *Perkins's Profitable Book*, p. 42, sec. 203; *Williams on Personal Property*, 7th ed., 411; *Broom's Common Law*, 4th ed., 131, 438, 440; *De Pothonier v. DeMattos*, E. B. & E. 461; 19 & 20 Vic., ch. 97, sec. 5; *Howard v. Shepherd*, 9 C. B., 297; *Jones v. Carter*, 8 Q. B. 134; *Balfour v. Sea Fire Life Insurance Co.*, 3 C. B. N. S. 300, 308; *Kepp v. Wiggett*, 6 C. B., 290, note *a*.

RICHARDS, C. J., delivered the judgment of the Court.

The old common law doctrine, that the assignee of a chose in action could not sue in his own name, having been changed by 35 Vic., ch. 12, O., much of the old law as to the doctrines of privity of contract and interest in the original contract are inapplicable. The equitable rule that the assignee could enforce the original contract in his own name, when the parties were in a Court of Equity, was probably intended by our Legislature to be the rule at law now. There seems to be little use in maintaining any distinction since the passing of the statute 36 Vic., ch. 8, O.—the Administration of Justice Act of 1873.

If the plaintiff Brocklebank had given to his co-plaintiff, for a valuable consideration, a declaration that he held his individual debt against Ellis for the benefit of the co-partnership, I suppose in Equity, if the matter were properly before that Court, the claim might be enforced in the name of the firm.

The doctrine that a man could not assign personal property or land to himself, was no doubt established on the

ground that it was absurd for a man to give anything to himself; and when the property passed by delivery, either symbolical or real, if he delivered it to another the property might well be said to pass to that other.

But when by the statute of uses the property passed by virtue of the statute, as a man might be seized to his own use, a conveyance to himself and another was good.

In *Sanders on Uses*, 4th ed. vol. i. p. 129, it is said, "It was absurd that a man should make a conveyance, or give possession by livery of seisin to himself; and therefore if a feoffment had been made to a stranger and the feoffor, the stranger took the whole. But now, if a feoffment be made to the use of the feoffor, or to the use of the feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone, in the first instance, and in him and the stranger in the second."

In *Perkins's Profitable Book*, p. 42, secs. 203, 204, it is laid down "And it is to be known, that if a man make a deed of feoffment of his own land to himself and a stranger, and make livery of seisin to the stranger according to the deed, all shall pass to the stranger, and nothing to himself; for he cannot give to himself as this case is * * And if a man make a deed of feoffment to two, and one of them dies before livery of seisin made according to the deed, and afterwards livery of seisin is made to him that surviveth, according to the deed all shall pass to him."

The practice in Equity, where it was necessary to vest chattels personal held in trust in an old and a new trustee, previous to the passing of the Imperial Stat. 22 & 23 Vic., ch. 35 sec. 21, was for the old trustee by one deed to assign the chattel interest to A., and then A. by another deed usually by endorsement on the other deed, re-assigned it to the old and new trustee, as joint tenants.

If the trust estate be of a freehold nature and the whole legal estate is to be vested in the trustees, a conveyance under the statute of uses is sufficient, for the old trustee may release the lands to the use of himself and the new trustee, and the statute will operate to transfer possession. See *Lewin on Trusts*, 3rd ed., 568-9.

It appears, however, if the trust estate consist of money in the funds or other property transferable in the books of any company, then by one and the same deed the donee of the power may nominate the new trustee, and the old and new trustee may execute a declaration of trust of the stock or other property intended to be transferred, and after the execution of the trust the stock may be transferred into the joint names.

The Imperial Statute, 22 & 23 Vic., ch. 35, sec. 21, and the Statute of Canada, 29 Vic. ch. 28, sec. 19 are to this effect: Any person shall have power to assign personal property, *now by law assignable*, including chattels real, directly to himself and another person, or other persons or corporation, by the like means as he might assign the same to another.

If a debt is considered personal property within the meaning of this section, a difficulty is suggested, that at the time the Act was passed debts were not assignable by law.

I apprehend that the assignment of debts has long been recognized by Courts of Law.

In *Balfour v. The Sea Fire Life Insurance Co.*, 3 C. B. N. S. 305, in *arguendo* counsel referred to a case cited in *Spence's Equitable Jurisprudence*, 635, upon the authority of *Brooke*, where the plaintiff had purchased from the defendant certain debts that were due him and gave the vendee a bond for the price. The plaintiff afterwards filed a bill to be relieved from the bond on the ground that nothing passed to him by the assignment of the debts, they being choses in action, not assignable in law. The Chancellor, with the concurrence of the Justices of both benches whom he called to his assistance, decided that the bond should be delivered up as given without consideration, "*pur ceo que le plaintiff ne poet aver quid pro quo*," and the defendant on refusal was sent to the fleet.

Willes, J., said, "The case cited from *Brooke* is wrong for two reasons: first, that no consideration at all is necessary for a bond; secondly, that now debts may be the subject of assignment." In giving judgment he said, p. 305, "With regard to the authority cited from *Brooke's Abridgment*, I should

have thought a much better authority might have been found for the proposition that a Court of Equity would prevent a party from suing upon a security the consideration for which had failed. The Court there seem to have considered that there could not be an assignment of a debt. That doctrine has, as every one must know, been long since exploded, certainly so long since as the year 1791, and probably two hundred years before—as appears from *Master v. Miller*, 4 T. R. 340, where Buller, J., says, ‘It is laid down in our old books, that, for avoiding maintenance, a chose in action cannot be assigned or granted over to another : *Co. Litt.* 214 *a.* 266 *a.* ; 2 *Roll.* 45 *l.* 40. The good sense of that rule seems to me to be very questionable ; and in early as well as modern times, it has been so explained away that it remains at most only an objection to the form of the action in any case.’”

I think this confirms the view I have always entertained, that debts were assignable, but not assignable so as to permit the assignees to sue for them in their own names.

If debts are to be considered as personal property, within the meaning of 29 Vic. ch. 28, I think they were assignable by law when that Act was passed, and the Act of Ontario now permitting the assignees to sue in their own name would, in that view, cover the whole ground (a).

But 35 Vic. ch. 12, O., making every debt and chose in action arising out of contract assignable at law by any form of writing, and authorizing the assignee to sue thereon in his own name, by sec. 3 declares that, “‘Assignee’ shall include any person now being or hereafter becoming entitled * * to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys * * thereby secured.”

The plaintiffs here undoubtedly could have given an effectual discharge of the debt that was assigned by Brock-

(a) In the *Queensbury Industrial Society (limited) v. Pickles et al.*, 11 Jur. N. S. 877, 13 L. T. N. S. 295, in the Court of Exchequer, a bond given by a salesman duly to pay over money was considered “property.”

lebank to them, and they no doubt had the beneficial interest in the debt so assigned.

The general rule of decision in the Courts now is to carry out what was the intent of the parties, and there can be no doubt the intent was that the plaintiffs should have this portion of the debt.

The objection is one which practically is one of form. If Brocklebank had assigned to a third person, and that third person to the plaintiffs, there would be no doubt.

On the whole, considering the present state of the law as to a party assigning personal property to himself and another, and the rights of assignees of choses in action to sue in their own names, I think we should be adhering to the letter, rather than than the spirit of the law, unless we made this rule absolute to increase the verdict as desired in the rule.

Rule absolute.

OLIVER V. MOWAT.

Deed—Delivery as escrow—Operation by relation back—Eviction.

Plaintiff was defendant's tenant of premises in Toronto, for which rent was in arrear to the amount of \$145.83. Defendant sold the premises to the Crown. The deed, dated the 23rd of October, 1872, was delivered by F., the agent at Toronto of the Minister of Justice, to M., the agent of the defendant, on the 15th of November, for execution. On the 16th it was executed, and was by M. handed to F. as an escrow, to become a deed when the money was paid. The deed was returned to F. on the 26th of November, and he registered to it on the 29th, but the money was not paid till the 7th of December. Defendant having distrained on the plaintiff for rent on the 29th of November:

Held, That the deed did not become operative from its original delivery by relation back, in which case defendant would have had no reversionary interest at the time of the distress, but from the payment of the purchase money only.

It also appeared that the defendant had rented the outside of the fence around the premises to one C. to post bills on, but the plaintiff claiming the fence C. posted no bills, and only put up a notice forbidding others to post bills without his leave, which notice was pulled down. *Held*, no eviction.

REPLEVIN for a quantity of lumber, office furniture, cordwood, &c.

Pleas: 1. Goods not the goods of the plaintiff. 2. Avowry, that the goods were taken for \$325 rent in arrear from plaintiff to defendant.

The plaintiff joined issue on the first plea, and to the avowry pleaded: 2. Non tenuit. 3. No rent in arrear. 4. That by virtue of an indenture made between the plaintiff of the first part, his wife of the second part, and Her Majesty the Queen of the third part, dated 23rd October, 1872, the defendant granted, conveyed, and surrendered the said land, houses, out-houses, and all his right and interest therein, to Her Majesty, reserving no reversionary interest therein; and at the time of the taking of the said goods and chattels the defendant had no reversionary interest in the said lands, houses, out-houses, or any of them, enabling him to distrain for the said rent, as in the said avowry is alleged, or otherwise. Issue was joined on these pleas.

The cause was tried before Galt, J., at the Spring Assizes of 1873, without a jury.

It appeared, at the trial, that the plaintiff was a tenant of defendant of certain premises in Toronto, which the defendant sold to the Dominion Government. The amount of rent due when the distress was made, was \$145.83. The deed, from the defendant and his wife to the Queen, was dated the 23rd October, 1872, and registered on the 29th November, 1872, at 11.30 a.m. The distress was made on the 29th November, between 1 and 2 p.m., and the tenant was then selling his goods by auction.

The deed in question was delivered by the agent of the Minister of Justice, to the defendant's agent at Toronto, to be executed, on the 15th November. On the 16th it was returned again. The deed was sent to Ottawa for the approval of the description, and was returned on the 26th November, and registered by the agent of the Minister of Justice at Toronto, on the 29th; and the defendant's agent on the 3rd December, wrote and requested the agent of the Minister of Justice to return the deed.

On the part of the defendant, Mr. MacLennan, Q. C., the agent of defendant, was called, and stated that the deed was delivered as an escrow, to become a deed when the purchase money was paid. The money was not paid until the 7th December.

Mr. Fleming, the agent of the Minister of Justice,

and Mr. Maclennan, differed in their statement as to the delivery of the deed, Mr. F. saying there was no condition as to the delivery of the deed, except as to the approval of the description by the Minister of Justice.

There had been a dispute between the plaintiff and defendant's agent, Maclennan, about the latter's renting the fence around the premises to Cooper for a year from 19th October, 1871, to post bills on. When Cooper, who obtained this right, went to the plaintiff, he claimed the fence as his. Cooper never used the place. He put a notice up forbidding any person to post bills without leave from Cooper's office, and these notices were pulled down.

The learned Judge, who tried the cause without a jury, reported that he was satisfied the deed was delivered to Mr. Fleming as an escrow, not to take effect until the money was paid, which was on the 7th December; and that in his opinion there was no eviction by the alleged letting of the fence to Cooper for advertising purposes. He found, however, for the plaintiff, on the ground that the money having been paid on the 7th December, the deed became operative from the time of delivery and acceptance by the Minister of Justice, which was before the distress was made on the 29th November, and therefore when the distress was made the defendant had no interest in the land and could make no distress.

He entered a verdict for the plaintiff, damages \$4, with leave to defendant to move to enter a verdict in his favour.

In Easter term, *Ewart* obtained a rule *nisi* to set aside the verdict and enter a verdict for the defendant, or a non-suit, pursuant to have reserved.

In this term, *McDougall* shewed cause. The distress was made on the 29th of November. The land was conveyed to the Queen on the 15th November, and the conveyance handed to the agent here of the Minister of Justice on the 16th. The only condition was, that if the description was correct the deed would be retained, if

incorrect, it would be returned. The deed was approved of and registered before the distress was made. The rent distrained for was for thirteen months, due on the 1st November, 1872. There was also eviction as to part by renting the fence to Cooper to post bills on, and there could be no distress: *Upton v. Greenlees*, 17 C. B. 30; *Morrison v. Chadwick*, 7 C. B. 266; *Stavelly v. Allcock*, 16 Q. B. 636; *Neale v. MacKenzie*, 1 M. & W. 747; *Woodfall L. & T.*, 10th ed., 737.

There were none of the formalities of an escrow, and Mr. Fleming's evidence differs from Mr. Maclellan's as to the delivery and the conditions on which it was delivered. The condition having been complied with, the deed had relation back to its original delivery, and it was after that time the distress was made: *Murray v. The Earl of Stair*, 2 B. & C. 82; *Doe d. Garnons v. Knight*, 5 B. & C. 671; *Cumberlege v. Lawson*, 1 C. B. N. S. 709.

C. Robinson, Q. C., contra. The deed does not, for the purpose of making void this distress, relate back to the time of delivery; *Shep Touch*, 73; *Kent's Comm.*, 11th ed., vol. iv., p. 455; *Trust and Loan Co. v. Covert*, 32 U C. R. 222, 229; *Parker v. Hill*, 8 Metc. 447; *Washburn on R. P.*, 2nd ed., vol. ii., p. 614; *Perkins's Profitable Book*, 12th ed., sec. 10. The putting up a notice forbidding the using of the fence, which was afterwards pulled down, is no eviction, and the learned Judge at the trial did not think it was.

RICHARDS, C. J., delivered the judgment of the Court.

I do not understand that the learned Judge, who tried the cause without a jury, was of opinion there was an eviction. The evidence does not lead to that conclusion.

The question of eviction was very much discussed in *Upton v. Greenlees*, 17 C. B. 64; where the Chief Justice, Sir J. Jervis, said in giving judgment, referring to the present law on the subject of eviction, "I think it may now be taken to mean this,—not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the

tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character; and done with that intention. * * * The question, therefore, of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury."

We think the question as to eviction ought to be decided in favor of the defendant. The plaintiff really was not deprived of any right which he had, nor does it appear that defendant wished or intended to deprive him of any right.

As to the effect of a deed delivered as an escrow, it is thus laid down in *Shep. Touch.*, at p. 59: "Where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it and laid it by me, and not delivered it at all; and therefore in that case, albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good. * * But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were (had been) delivered immediately to the party to whom it is made. * * * Howbeit, it seems the delivery is good; for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the lifetime of the parties, and *postea consummata existens* by the performance of the conditions, it taketh its effect by the first delivery without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery. [The argument does not establish the conclusion. As no estate passes till the second delivery, the grantee hath not any estate till that time, and consequently cannot alien or lease. It is only from necessity, and for the purposes of title, that there is any relation. As to collateral

acts, there shall not be any relation ; for if the obligee, &c., doth release before the second delivery, such release will be void if the release be founded on the instrument as a complete and perfect bond. It was also in one case resolved that to some intent the second delivery hath relation to the first, and to others not ; and yet the second delivery hath all its force by the first delivery, and the second is but an execution and consummation of the first delivery.] In the case referred to, in 3 Rep. 35 b., it was resolved : ‘ 2nd. That, to some intent, the second delivery hath relation to the first delivery, and to some not, and yet, in truth, the second delivery hath all its force by the first delivery, and the second is but an execution and consummation of the first ; and, therefore, in case of necessity, *et ut res magis valeat quam pereat*, it shall have relation by fiction to be his deed *ab initio* by force of the first delivery, and, therefore, if, at the time of the first delivery, the lessor be a *feme sole*, and before the second delivery she takes husband, or if before the second delivery she dies, in that case if the second delivery should not have relation to this intent to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases would be void, and, therefore, in such case for necessity, and *ut res magis valeat*, to this intent by fiction of law, it shall be a deed *ab initio*, and yet, in truth, it was not his deed till second delivery, * * * and hereby it appears that the reason of the law (that to some intent the second delivery shall have relation, and to other intent no relation) is all one, *scil.* for necessity, and *ut res magis valeat quam pereat*.”

Now, here there is no necessity to make the deed effective or that it should prevail, that it should have relation to the first delivery, and in that view it would only take effect from the second delivery, which was to take place when the money was paid, being, as I understand the evidence, on the 7th December.

Kent's Comm., 11th ed., vol. iv, 526, speaking of an escrow, says : “ Until the condition be performed and the deed delivered over, the estate does not pass, but remains in the

grantor. Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time, but the general rule does not apply when justice requires a resort to fiction * * * But if the fiction be not required for any such purpose, it is not admitted, and the deed operates according to the truth of the case, from the second delivery."

In *Perkins's Profitable Book*, after referring to the effect of a deed of *feme sole* delivered as an escrow, and her marriage before the condition performed, and the estate passing, notwithstanding the second delivery after condition, it is said, sec. 10. "But in said case the grantee shall not have any rent by force of the grant, before the last delivery; that is to say, when it took effect as the deed of the woman, and so to such purpose it shall not relate to the first delivery, *scil.* when it was delivered as an escrow," &c. See also *Washburn's Law of R. P.*, vol. ii., p. 614.

I understand this was really the point on which the learned Judge decided at the trial. The question whether the delivery to Mr. Fleming was a delivery to the Queen, or to him acting for the Queen, or to him to be delivered to some other person for the Queen, was not raised before the learned Judge, nor before us in argument. The doctrine laid down in some of the cases seems to be, when the deed is delivered direct to the grantee, though on the terms that it is only to become, or be delivered as the deed of the grantor on certain moneys being paid, or certain other things done, the conditions would be inoperative and the deed would become effective at once, before the conditions were performed. But if delivered to a stranger to be handed or delivered to the grantee on the performance of the conditions, such as payment of money, &c., then it would only be considered as a perfected deed from the time of the performance of the conditions.

Whether the deed would operate from the original delivery by relation is the point now under discussion, on which the learned Judge decided against the defendant.

We do not think, in a case like this, where the defendant

has not paid any rent, and he raises this purely technical question to avoid paying the rent, which the defendant is undoubtedly entitled to receive, and all of which accrued before the first delivery of the deed, that we should, of ourselves, take any new grounds not raised at the trial, and which if they had been raised might have been met by the evidence.

On the whole, we think the rule must be made absolute to enter a verdict for the defendant, pursuant to the leave reserved.

Rule absolute.

SMITH V. McCALLUM.

Agreement—Consideration for—Estoppel by a receipt under seal.

Action on the common counts, and on an agreement between the plaintiff and defendant, dated the 8th of April, 1873, by which, in consideration that the plaintiff would deliver to the defendant at Port Maitland, when requested, that portion of the rigging of the vessel *R. D.*, then on board the said vessel, the defendant would pay the plaintiff \$400. The defendant pleaded payment before action and release by deed.

At the trial this agreement was proved, and one of even date, under the plaintiff's hand and seal, by which the plaintiff sold to the defendant for \$800, the receipt whereof was acknowledged, the body and hull of the *R. D.*, and also his rights in a contract for stripping said vessel and any payments due from the T. Insurance Co. for stripping said vessel, or from defendant for any work done under the contract to strip the vessel. It also appeared that the vessel having run upon a reef in Lake Erie, the plaintiff had been employed by the T. Insurance Co. to strip her and put the outfit in a place of safety, for which he was to receive \$250 and the hull. Defendant bought the outfit from the Insurance Co. for \$930 and the hull and rights under the stripping contract from the plaintiff for \$800. The defendant only paid the plaintiff \$400 on the agreement signed by the plaintiff, and gave him the agreement now sued on.

Held, that the plaintiff was not estopped by the receipt in the deed from shewing that the agreement sued on was part of the consideration for said deed, and that the \$400 mentioned in said agreement was unpaid.

DECLARATION: First count, common count for goods sold, &c. Second count, that on the 8th of April, 1873, by a certain agreement made between the plaintiff and the defendant, in consideration that the plaintiff would deliver to the defendant at Port Maitland, in the county of Haldimand, when requested by the defendant so to do, that portion of the outfit and rigging of the schooner called the *Russel Dart*, then on board of the said vessel, the

defendant promised to pay the plaintiff the sum of \$400: that afterwards, at the defendant's request, he delivered such portion of the outfit and rigging of the said vessel at the said port,—yet the defendant did not pay the sum of \$400, or any part of it.

Pleas: 1. To the first count, never indebted. 2. To the second count, that the defendant did not promise as alleged. 3. To the second count, that the plaintiff did not deliver the said portion of the said outfit and rigging of the said vessel at the said port as alleged. 4. To the second count, payment before action. 5. To the whole declaration, that after the accrual of the causes of action in the first and second counts mentioned, and before this suit, the plaintiff, by deed, released the defendant therefrom.

Issue.

The cause was tried at the Fall Assizes, at Cayuga, before Hagarty, C. J. C. P.

It appeared from the evidence at the trial that the plaintiff was employed by the Mutual Insurance Company of Toledo to strip the vessel *Russel Dart*, which had run on a reef opposite Hoover's Point, on Lake Erie. He was to receive \$250 from the Insurance Company, and the hull of the vessel, for stripping her and putting the outfit in a place of safety. The defendant purchased the outfit from the Company for \$930, and he bought from the plaintiff the hull of the vessel and his rights under the insurance contract for \$800.

The agreements between the parties were dated the 8th of April, 1873, after some portions of what would be considered the outfit had been sent to Port Maitland, and other portions were at Hoover's Point.

The agreement as to the purchase of the vessel, signed by the plaintiff was as follows:—

"This indenture witnesses that I, Albert C. Smith, of Rainham, county of Haldimand, and Province of Ontario, do sell to Lachlin McCallum, of the Village of Stromness, county and Province aforesaid, for the sum of \$800 of law-money of Canada, to me in hand well and truly paid by

the above-named Lachlin McCallum, the receipt whereof is hereby acknowledged, have bargained, sold, and set over, and do by these presents sell, bargain, and set over unto the said Lachlin McCallum, his heirs and assigns for ever, that is to say, the body or hull of the schooner *Dart*, now lying at Hoover's Point, on Lake Erie, and also any right that I may have in a certain contract for stripping the said vessel or schooner *Russel Dart*, or any payments or any money due me from the Mutual Insurance Company of Toledo, Ohio, for stripping said schooner or vessel *Russel Dart*, or from Lachlin McCallum, of the village of Stromness, for any work done under said contract for stripping of the vessel, and I further bind myself, my executors, administrators and assigns, by these presents to defend the said Lachlin McCallum in possession of the said vessel *Russel Dart* against all or every person or persons whatever at law or in equity.

"In witness whereof, I have this 8th day of April, 1873, set hand and affixed my seal.

"In presence of

"A. C. SMITH [L.S.]"

The agreement signed by defendant was as follows:—

"\$400.00.

"Stromness, April 8th, 1873.

"On or before the 18th day of June next, in consideration of Albert C. Smith, of the township of Rainham, delivering me on board my tug, alongside the schooner *Russel Dart*, at Hoover's Point, on Lake Erie, or at Port Maitland, whenever he is requested to do so by me, the balance or that portion of the said schooner's outfit not delivered at Port Maitland heretofore, now on board the vessel *Russel Dart* at this time, I promise to pay the sum of four hundred dollars.

"(Signed) L. McCALLUM."

The plaintiff in his examination said that he sold the body of the vessel and a claim he had of \$250 on the vessel against the defendant for \$800 in all. The agreement was drawn up and the defendant paid him

\$400. It was then agreed that the defendant would pay him \$400 on the 18th of June on delivery to the defendant of the head gear, fore boom and gaff then at Hoover's Point. The standing rigging and pump then on the schooner he was to leave in the schooner; he did not own them, defendant owned them; he put the foregaff and boom on the schooner. He sent the balance of the stuff to the defendant, who told the plaintiff afterwards that he had received them. He said the whole amount the defendant was to pay him was \$800.

The plaintiff, in cross-examination, also said, under the second instrument the defendant was to give him \$400 in cash or a cheque on delivering the things. He said he did all that was necessary under the second agreement.

He was further cross-examined as to the articles he was to deliver under the agreement, and where they were at the time.

Another witness proved the delivery of the part of the schooner's outfit which was at Hoover's Point, at Port Maitland for the defendant.

For defendant it was objected that the plaintiff could not recover, because all was embraced in the \$800 for which the defendant had the release under seal, and *Harrison v. Preston*, 22 C. P. 576, was cited.

The learned Chief Justice reserved leave to move to enter a nonsuit on that ground.

The plaintiff's counsel contended there was a fresh consideration, and the agreement was complete in itself.

The defendant, on being called as a witness for himself, said he bought the hull from the plaintiff and his rights under the insurance contract for \$800; he said he paid \$400 and gave this due-bill; it was all done together; this due-bill was the second agreement: that the defendant agreed to deliver him the outfit of the vessel, and that he had failed to deliver certain items, of which he had an account, amounting to \$228.57; he said he was ready to pay the difference between that sum and the \$400.

The plaintiff, on being recalled, stated the understanding

he had was that he was to deliver the defendant the stuff he had in store at Hoover's Point. He said he delivered any article he had agreed to deliver, or had it delivered.

The learned Judge left it to the jury on the merits, the defendant claiming deductions out of the \$400 for articles alleged not to have been delivered. He told the jury the plaintiff was bound to deliver all the outfit of the schooner which under his contract with the insurance company to strip and secure the outfit was saved. He did not think he was answerable for things lost and washed away and not saved by him in the *boná fide* performance of his contract with the Company.

The defendant's counsel renewed his objections in the form in which he had moved for the nonsuit.

The jury found for the plaintiff, damages \$400.

In Michaelmas Term *Harrison*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit or verdict for the defendant, pursuant to leave reserved, on the ground that the plaintiff was at law estopped by the receipt under seal in the deed on which he sued, acknowledging payment of the money which he sought to recover in this action; or why a new trial should not be had on the ground that the verdict was against law, evidence, and the weight of evidence, and for excessive damages.

Burton, Q. C., in this term, shewed cause. The instrument sued on and given in evidence at the trial is for a different bargain and consideration from the one relating to the sale of the vessel and the contract with the insurance company for the stripping of the vessel. This agreement is to pay a sum of money on delivering the balance of the outfit of the schooner to him, which was not at Port Maitland, and which was at that time on board the *Russel Dart*.

Harrison, Q. C., contra. The \$800 was the consideration for all that was to be done. That was shewn by the evidence of the plaintiff himself, and, that being the case, he could not in a Court of Law shew that only \$400 of the

\$800 had been paid, and that the remaining \$400 now sued for was still unpaid. He cited *Harrison v. Preston*, 22 C. P. 576.

RICHARDS, C. J., delivered the judgment of the Court.

On the question raised at the trial, as to whether the plaintiff had delivered the portion of the outfit which he had agreed to deliver, we understand the learned Judge who tried the cause is not dissatisfied with the verdict, and we see no good reason for interfering. The written instrument seems to refer to the portion of the outfit not delivered before at Port Maitland and on board the *Russel Dart* at that time.

As to the strict technical ground, we have looked at the case of *Harrison v. Preston*, 22 C. P. 576, cited on the argument, and considered the authorities there referred to.

It is not pretended that the \$400 sought to be recovered in this action was paid by the defendant to the plaintiff, —both parties under oath say it was not paid—but we are asked to turn the plaintiff out of Court because he unwittingly signed a document and put his seal to it, in which he acknowledged he had received \$800, when in fact he only received \$400. We certainly will not do so, unless compelled by unmistakable rules of law.

The instrument under seal which is produced, and by which the plaintiff acknowledged to have received \$800, is a bill of sale of the hull of the vessel and the plaintiff's interest in a contract for the stripping of the vessel, and any payment due him under the said contract.

The contract sued on is an agreement to pay the plaintiff \$400, in consideration of his delivering a certain portion of the outfit of the schooner to the defendant at Port Maitland.

Under what plea does the defendant contend he ought to succeed? The contract sued on was produced, and was, no doubt, signed by the defendant.

The plaintiff does not declare for the price of the hull or vessel sold, or for the amount agreed to be paid for plaintiff's interest in a certain contract. He does not produce

any instrument under seal to prove his contract, nor does he claim under the instrument under seal. He proves his contract as set out in the declaration signed by the defendant himself.

No money has in fact been paid to the plaintiff according to the terms of that contract, so that under the plea of payment before action I fail to see how the defendant can claim a verdict.

The fifth plea is, that after the accrual of the causes of action, and before the commencement of this suit, the plaintiff released the defendant therefrom by deed. The bill of sale does not pretend to be any release of the agreement to pay the \$400 for delivering the outfit to him, nor does it on its face admit having received any money in discharge of that cause of action.

The defendant wishes to be allowed to shew by parol that the \$800 which the agreement under seal admits to have been received for the vessel and his interest under the contract with the Insurance Company, was received in fact for that and the agreement to deliver the outfit at Port Maitland, thus varying its terms by parol; but the undisputed fact that only \$400 was paid is not to be shewn by the same witness. It seems to me if the defendant was allowed to vary the effect of the instrument by parol evidence, he must allow the parol evidence to shew the truth.

Here the action is not brought on the bill of sale, or for the consideration which has been acknowledged to have been received by that instrument, but on a collateral agreement not embodied in the bill of sale nor necessarily a part of it.

There is no decided case that we have been referred to which shews that the defence contended for by the defendant arises on a state of facts similar to what was proved at the trial.

I do not see that it would be contradicting the receipt of the payment of the \$800 by the bill of sale to shew that the plaintiff agreed to take \$400 in cash then and defend-

ant's collateral agreement to pay \$400 more when he should deliver the outfit of the vessel at Port Maitland. Something more was to be done by the plaintiff. It was not the bald payment of the money which he had acknowledged the receipt of.

The general doctrine applicable to estoppel by deed, I apprehend, is, that no man shall be permitted to dispute his own solemn deed. Now the plaintiff's deed only admits receiving the \$800 for the vessel and the agreement with the Insurance Company. He does not admit under his seal that he received \$400 for the delivery of the outfit of the vessel to the defendant, and therefore I cannot see how the plea of payment of the second agreement is made out.

The case of *Harrison v. Preston*, 22 C. P. 576, differs in some respects from this case. There I apprehend it was necessary to prove the plaintiff's case to produce the conveyance of the land, and that would shew the admission of the payment of it in full by the recital in the deed, and then it would appear nothing further was to be done. Here, however, the outfit was to be delivered at Port Maitland, if defendant required, and a portion of it was in fact delivered there, and the plaintiff's right of action was complete under the agreement which is spoken of as the second agreement. He was not required to produce the agreement under seal to prove his cause of action, and he did not sell the outfit to the defendant.

The defendant must shew by evidence a payment of this debt. If he wished to bind the plaintiff by the estoppel, could he not have pleaded it; and if he could have pleaded it, and did not, he waives the estoppel, and the jury must find the truth. See the notes to the *Duchess of Kingston's Case*, 2 Sm. L. C., 6th ed., 753 (a).

The cases in our own Courts which decide that the receipt under seal of the purchase money is conclusive,

(a) See *Ketchum v. Smith*, 20 U. C. R. 313; *Sparling v. Savage*, 35 U. C. R. 250; *Casey v. McColl*, 19 C. P. 90.

are where the instrument itself which proves the contract also shews the payment of the purchase money: here that is not the case.

We think the rule must be discharged.

Rule discharged.

EMMA HOWELL HUTTON, Executrix of John Hutton deceased, v. THE CORPORATION OF THE TOWN OF WINDSOR.

Municipal corporations—Duty to repair sidewalks—Death arising from accident—Excessive damages—Contributory negligence.

H., a man seventy years of age and feeble, was found at night lying beside an excavation for a drain under the sidewalk in defendant's street, where several boards had been taken up and replaced with a temporary covering of boards laid at right angles to and projecting two inches above the rest of the sidewalk. He afterwards died from the effects of the fall. His administratrix sued the defendants, alleging that deceased *fell into the ditch*, which was open, and thus received the injury, while the defendants alleged that the ditch was securely covered, and that deceased had struck his foot against the projecting plank, and fallen.

Held, that upon the evidence, more fully set out below, the finding of the jury that he *fell into the ditch* owing to the insecure way in which the defendants left the opening, which was the only point left to the jury, was unsatisfactory.

The deceased was insolvent at the time of his death, and in failing health, not capable of much labour, but there was evidence that he was able to superintend his business, which was that of an innkeeper, and went to market. The jury having given \$4,000, apportioned among his children: *Held*, that the damages were excessive.

The deceased having passed over the place half an hour before, when it was light and the state of the sidewalk could be seen: *Held*, that there was evidence of contributory negligence on his part.

Remarks as to the nature of obstructions which would make the defendants liable, and the care required from persons with defective sight, &c.

DECLARATION: That it was the duty of the defendants to keep the roads, streets, and public highways within their municipality in repair, yet they neglected to keep Sandwich street in repair, and suffered to be dug a certain trench or excavation in the said public road, and allowed the same to remain without sufficient protection to persons.

necessarily and lawfully passing to and fro, and walking upon said road, and left the same after nightfall, without any light or signal being placed at or near the said trench or excavation, to denote or shew that the same was there. And by reason of the negligence and default of the defendants the said John Hutton, while lawfully passing along the said highway, after nightfall, fell into the said trench or excavation, and was thereby wounded and injured, and by reason of the said wounds and injuries thereby, and by reason of the default and negligence of the said defendants occasioned to him as aforesaid, the said John Hutton, afterwards, and within twelve months next before the suit, died. And the plaintiff, as executrix, for her own benefit, as being the wife of the said John Hutton, and that of Albert Hutton, William Hutton, Robert Hutton, Edward Hutton, John Hutton, Frank Hutton, Phoebe Hutton, Elizabeth Hutton, and Ellen Hutton, children of the said John Hutton, according to the statute in such case made and provided, claims \$10,000.

Second count: that the defendants caused and permitted a drain or excavation on Sandwich street, in the said town, and negligently left the same uncovered and exposed, in such a manner as to be dangerous for persons passing along said street, especially during the night and when dark, nor did the defendants, as it was their duty to do, place any light, signal, or watch, whereby persons passing along said street should be warned of the said drain or excavation and the danger thereof. And while the said drain or excavation was so exposed, and in such negligent and improper condition as aforesaid, the said John Hutton was in the night time lawfully passing along the said street, and being, by reason of the said negligence of the defendants and their neglect of duty in the premises, unwarned of the said drain or excavation, and of the danger thereof, he accidentally fell into said drain or excavation, and was thereby and by reason of the said neglect of the said defendants wounded and greatly injured in his body, whereof the said John Hutton sickened, and afterwards, and within twelve months

before the commencement of this suit, died. And the plaintiff, who was the wife of the said John Hutton, as executrix, as aforesaid, for her own benefit and the benefit of the children of the said John Hutton, (naming them as in the last count,) and because the death of the said John Hutton was caused by the neglect and default of the defendants, brings suit pursuant to the statute in that behalf, and claims \$10,000.

Plea to each count : not guilty.

Issue.

The cause was tried at the Spring Assizes of 1873, at Sandwich, before D. J. Hughes, Esq., County Judge of Elgin, sitting for Richards, C. J.

The notice given under the Statute stated that the damages were claimed, by reason that through defendants' negligence in making the excavation, and leaving it uncovered, or loosely covered, &c., the deceased, while passing the sidewalk on the evening in question, fell into the said excavation, and was hurt, and afterwards, and in consequence of such hurt, died.

The plaintiff's evidence shewed that the corporation were having a drain cut across the road along which the sidewalk ran, and that the drain was intended to pass under the sidewalk, and for the purpose of excavating under the sidewalk several of the planks had been removed, for the space of about four or five feet. The sidewalk was eight feet wide. The planks were two inches thick. When the men stopped work at night the planks that had been taken up were laid across the aperture, and projected above the level of the rest of the sidewalk two inches.

The plaintiff's witnesses said the whole aperture made by taking up the planks had not been covered, that there was a space of two or three feet open.

The defendants' witnesses, generally, thought the whole space was covered. The man who acted as foreman stated that the whole space was covered ; that all the planks that had been taken up were placed across the aperture, and two or three others, which more than covered the whole space.

The night was dark, and there was no light placed at or near the spot where the repairs were being made.

The accident happened between seven and eight on the evening of the second of April. The person who first saw the deceased, said he was lying on the middle of the sidewalk, flat on his stomach. He was groaning when the witness spoke to him, and he said he was all but killed. This person when recalled said his body was on the west side of the ditch, his feet on the hole. His feet and a small part of his legs were lying in the ditch. No part of his body was on the east side of the ditch, or in the ditch. He had come from the east, and was travelling in a westerly direction.

One of the witnesses called for the plaintiff stated that Mr. Hutton had passed over the place with him about half past seven on his, Hutton's, way to the butcher's shop, and the accident must have happened on his return.

Hutton was said to be a man about seventy years of age, feeble, and walking with a shuffling gait. He had failed in business some three years before, and his circumstances were not such as to indicate that his business, that of an inn-keeper, was a flourishing one. He was not physically capable of much labour, but there was evidence that he superintended the business, and went to market.

At the end of the case the defendants' counsel moved for a nonsuit, on the ground that Hutton had gone over the place half an hour before, and had had an opportunity of seeing there was danger, and should have avoided it.

The learned Judge over-ruled the objection, because he considered it was the duty of the defendants to have made the place safe for foot passengers, passing over the opening at night, and it was not sufficient to cover the place merely, but they should have made it secure: that merely covering it, without making it secure, might have been the means of alluring the deceased, and making a trap for him there. He said he would leave it to the jury to say whether the place was really secure, and what the facts were on that point.

The Judge finally told the jury that they must find for the defendants unless they were satisfied that the deceased fell into the ditch owing to the insecure way in which the defendants left the opening, or because it was not covered. He told them to consider the circumstances under which he was found, the position in which the body was lying, how the feet were seen when he was found lying there—from which they might infer he fell into the ditch.

He had before that said it was the duty of defendants to have made the place safer for old and young, by night and by day, and he supposed the plaintiffs could recover if the deceased had tripped on the planks projecting two inches above the sidewalk, and in relation to that view he had told the jury an action would lie for having the plank over the opening in the sidewalk two inches above the general level, if by reason of that unevenness, there being no light there to warn the deceased, he stumbled and fell and thereby caused his death; or if a rusty nail were left on the sidewalk, and he stumbled and fell on the nail and hurt his knee, which resulted in lockjaw which caused his death; but that for neither of these supposed causes was the action brought, and they must find that he actually died from injuries resulting from falling into the drain, as alleged in the declaration and notice, and unless the result was immediately traceable to defendants' negligence, they should find for the defendants.

The counsel for the defendants objected that the learned Judge should have told the jury there was no reasonable evidence from which they could infer that the deceased fell into the ditch.

The jury found a verdict for the plaintiff, and distributed the damages as follows: Elizabeth, \$1,000; Nellie, \$500; Fannie, \$625; Ann, \$625; Thomas, \$625; Charles, \$625.—Total, \$4,000.

In Easter Term *C. Robinson*, Q.C., obtained a rule *visi* for a new trial, the verdict being contrary to law and evidence and the weight of evidence, in this, that there was

no evidence or no sufficient evidence of negligence on the part of the defendants, by which the death of the said John Hutton was caused, or which could render the defendants liable therefor, or of the cause of action in the declaration and particulars of claim, and the weight of evidence disproved such negligence and cause of action. And for misdirection of the learned Judge, in directing the jury that there was such evidence, and no evidence of contributory negligence on the part of the said John Hutton, and that there was evidence that the said John Hutton fell into the drain or excavation as alleged; and in directing the jury, that if the defendants left the planks covering such excavation resting upon and projecting two inches above the sidewalk they would be guilty of negligence and breach of duty, and responsible for any injury which might be caused to any person by tripping against such planks; and that the defendants were bound to have the sidewalk safe for the old and infirm as well as for other persons; and for excessive damages, there being no evidence of damages legally recoverable in this action to the amount or near the amount of such verdict; and because the said verdict does not find and direct that the amount thereof shall be distributed amongst the parties for whose benefit the action is brought, as by the statute in that behalf is directed.

During this term *Harrison*, Q. C., shewed cause. It is for the jury to say if there was negligence in the state of the road: *Merrill v. Inhabitants of Hampden*, 26 Me. 234; *Lawrence v. Inhabitants of Mount Vernon*, 35 Me. 100; *Hubbard v. Concord*, 35 N. H. 52; *Hall v. Manchester*, 40 N. H. 410; See, also, *Raymond v. City of Lowell*, 6 Cush. 524; *Smith v. Inhabitants of Wendell*, 7 Cush. 498; *Foreman v. Mayor, &c., of Canterbury*, L. R. 6 Q. B. 214; *Dillon on Municipal Corporations*, 2nd ed., secs. 752, 786, 788, 789, notes; *City of Lacon v. Page*, 48 Ill. 497. As to what is non-repair: *Hixon v. City of Lowell*, 13 Gray 59, 62; *Barber v. Roxbury*, 11 Allen 318; *Hewison v. City of New Haven*, 34 Conn. 136. It is no excuse that

the excavation arose from making repairs: *Buffalo v. Holloway*, 7 N. Y. 493; *Storrs v. City of Utica*, 17 N. Y. 104; *Milwaukee v. Davis*, 6 Wis. 374; *Smith v. Milwaukee*, 18 Wis. 63; *Pettigrew v. Commonwealth*, 25 Wis. 223; *Tripp v. Inhabitants of Lyman*, 37 Me. 250; *Shearman & Redfield* on Negligence, 2nd ed., 298, 408, *et seq.* When the duty is plain, proof of the existence of the defect is sufficient, and it is on the defendants to shew that the danger could not have been prevented: *Kearney v. London, Brighton, &c. R. W. Co.*, L. R. 5 Q. B. 415; L. R. 6 Q. B. 759. No question of notice can arise, as the defendants themselves were making the repairs: *City of Detroit v. Corey*, 9 Mich. 165; *Weet v. Trustees of the Village of Brockport*, 16 N. Y. 161, note; *Grant v. City of Brooklyn*, 41 Barb. 381. There was no evidence of contributory negligence: *Davenport v. Ruckman*, 37 N. Y. 568. As to damages: *Blake v. Midland R. W. Co.*, 18 Q. B. 93; *Franklin v. South Eastern R. W. Co.*, 3 H. & N. 211; *Dalton v. The South Eastern R. W. Co.*, 4 C. B. N. S. 296; *Duckworth v. Johnson*, 4 H. & N. 653; *Secord v. The Great Western R. W. Co.*, 15 U. C. R. 631; *Morley v. The Great Western R. W. Co.*, 16 U. C. R. 504; *Batchelor v. Buffalo and Brantford R. W. Co.*, 5 C. P. 127; *Pennsylvania R. W. Co. v. McCluskey*, 23 Penn. 526; *Mayne* on Damages, 2nd ed., 457. If the Court should think the damages too great, the parties might submit to a reduction.

C. Robinson, Q. C., contra. Both the declaration and the notice given under the Statute allege that the deceased fell into the ditch, and of this there was no reasonable evidence: the facts all tended to disprove it; and the probability is, that being old and feeble as described, and not lifting his feet, he struck his toe against the planks which projected two inches above the rest of the sidewalk, and was injured by the fall. The learned Judge expressed an opinion that such projection would form a cause of action, and this probably influenced the jury, though they were afterwards told that the plaintiff could not recover, under

the pleadings, unless deceased fell into the ditch : *White v. Crawford*, 2 C. P. 352. Such an elevation, of one plank above another, could not possibly support an indictment against defendants, and if not, it forms no ground of action : *Ringland v. City of Toronto*, 23 C. P. 93 ; *Raymond v. City of Lowell*, 6 Cush. 533 ; *Parker v. Lowell*, 1 Allen, 177. Neither could it be said that the death of deceased from such a fall was a consequence reasonably to be apprehended : *Williamson v. Grand Trunk R. W. Co.*, 17 C. P. 615 ; *Hoey v. Felton*, 11 C. B. N. S. 142 ; *Smith v. London and South-western R. W. Co.*, L. R. 6 C. P. 14. It was misdirection to say that the defendants were bound to have the sidewalk safe for old and infirm persons as well as others. They must provide only for persons of ordinary strength and activity : *Bridges v. The North London R. W. Co.*, L. R. 6 Q. B. 377 ; *Shearman & Redfield* on Negligence, 2nd ed., 469. The deceased should not have been out unattended after dark : *Davenport v. Ruckman*, 37 N. Y. 568. The deceased knew the place well, having passed over it only half an hour before, and there was therefore evidence of contributory negligence : *Shearman & Redfield* on Negligence, 2nd ed., sec. 414, note 2, sec. 413. See also *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 161. The damages are excessive. The deceased was insolvent two years before and at the time of his death. His health was bad, and his life probably not worth a year's purchase. In a pecuniary sense, which is all that can be considered, his family suffered in fact no loss. It is clear from all the evidence on both sides that he never could have earned or saved \$4000, or one-tenth of that sum : *Franklin v. South Eastern R. W. Co.*, 3 H. & N. 211.

RICHARDS, C. J., delivered the judgment of the Court.

I have gone over the evidence carefully and considered it.

The duty of the defendants was to take reasonable precautions to prevent accidents arising whilst they were making drains in the streets.

The drainage of a town is quite as necessary for the health of its citizens as highways are for the transaction of their business, and in discharging their duty they were not bound to make the place absolutely safe, but only reasonably so, and it might well be considered whether it would not have been a proper precaution to light the place so as to warn parties.

But the deceased had passed over the place half an hour before that, and according to the doctrine laid down and acted on in this Court in *Nicholls v. The Great Western R. W. Co.*, 27 U. C. R. 382, and *Rastrick v. The Great Western R. W. Co.*, 27 U. C. R. 396, and in the Court of Common Pleas in *Winkler v. The Great Western R. W. Co.*, 18 C. P. 250, there was ample evidence of contributory negligence on the part of the deceased. He knew the sidewalk had been taken up, and, according to the doctrines of those cases, when passing over the spot he should, as a reasonable man, have been cautious, and there is no reason to doubt if he had exercised due caution the accident would not have happened.

One of the plaintiff's witnesses said that in passing along that night he had stumbled at the boards, and came near falling; it was very dark; he did not think any person could see the ditch at that time of night; there was nothing there set up to indicate there was danger.

In the late case of *Ringland v. The Corporation of the City of Toronto*, 23 C. P. 93, Gwynne, J., in giving judgment takes the view of the liability of defendants, that unless they could have been indicted for a misdemeanor for the want of repair of the street, that no civil action would lie against them at the suit of a party injured. Here I doubt if an indictment would lie against the defendants (a).

I expressed my views on the subject of leaving questions of negligence to the jury in the case of *Winkler v. The Great Western R. W. Co.*, 18 C. P. 250, already referred to, in the

† (a) See also *Ray v. Corporation of Petrolia*, 24 C. P.

Court of Common Pleas. But for the decisions of this Court and the Court of Common Pleas in those actions against the Great Western Railway, and some other cases decided since, I should have said the question here was for the jury.

The broad way in which the learned Judge laid down the law as the obligation of the defendants to make the place secure, may perhaps have influenced the jury. They should have been told that the duty of the defendants was to take reasonable and necessary precautions to prevent accidents, and although they might have failed to do all that was necessary, if the deceased was guilty of want of reasonable care on his part that contributed to the accident the defendants were not liable.

I believe my learned brothers take a stronger view than I do as to the insufficiency of the evidence on the whole to sustain the verdict.

I consider the damages excessive under the evidence, and the finding of the jury on the point on which alone the learned Judge left it to them, (namely, that the defendant had fallen into the ditch), unsatisfactory.

And if it is to be left to the jury on the question of his falling in consequence of the planks projecting two inches above the surface of the sidewalk, the question of liability and contributory negligence should be broadly placed before the jury in the manner above intimated.

In relation to the numerous American cases cited, and commented on at the argument, I may observe that I am not prepared to say that any particular obstruction or elevation in a road or sidewalk is or is not negligence. The surrounding circumstances must all be looked to.

That which would be considered a breach of the obligation under the Municipal Act to keep a road in repair by the corporation of a city as to its most crowded thoroughfare, would probably not subject a township council to indictment in relation to a road which was used in the winter time, and then only by ox teams and sleds.

It is said in *Winn v. City of Lowell*, 1 Allen 180:—
“If the female plaintiff was a person of poor sight, common

prudence required of her greater care in walking upon the streets, and avoiding obstructions, than is required of persons of good sight. * * * It is not to be inferred that the Court decide that an elevation of a plank one inch and one half inch above its proper level, in a street is an indictable or actionable defect in the street."

In *Wilson v. City of Charlestown*, 8 Allen 138, where the plaintiff passed over the side walk covered with ice and knew it was slippery, it was held that she could not recover unless she exercised reasonable care.

On the whole we concur in granting a new trial with costs to abide the result.

Rule absolute, costs to abide the event (a).

(a) On a second trial, before Morrison, J., and a special jury, there was a verdict for the defendants, and the Court afterwards refused a rule *nisi* for a new trial.

BURROWES ET AL. V. DEBLAQUIERE.

Insolvent Act of 1864—Debts provable under—Covenants running with the land—Plea bad in part—Demurrer.

Declaration. First count, on the covenant for right to convey in a deed of three lots of land by defendant to plaintiffs, alleging that at the time of making the conveyance defendant had granted one of the lots to S.

Second count, on the covenant for quiet possession in the same deed. Breach, that before making it, defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in Chancery and foreclosed his mortgage, by which the plaintiffs lost this lot.

Third count, that defendant, being possessed of a lot of land, mortgaged it to one S. for £250 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee for \$22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land, and were put to costs, &c.

Fourth count, common money count.

Fourth plea: that after the time when defendant is alleged to have become indebted and liable to the plaintiffs, and after the Insolvent Act of 1864, defendant made an assignment under it, and in his schedule the alleged claim of the plaintiffs, which was then, if they ever had any claim, provable against defendant's estate, was included; and that afterwards defendant duly obtained an absolute discharge under said Act from the claims of his creditors, including the plaintiffs, which was duly confirmed.

Fifth plea: To the first three counts: that before the alleged breaches, the plaintiffs by deed conveyed all their estate in the land in those counts mentioned to one D., and they have not and had not at the commencement of this suit got back or become seized of their former or any estate in said land, whereby the causes of action in those counts, could not and did not accrue to the plaintiffs. On demurrer to these pleas:

Held—1. Fourth plea bad, as to the first three counts; for the plaintiffs' claim under those counts could not have been proved against defendant's estate—not being for a debt due and payable, or due but not then payable, nor upon a contract dependent on a condition or contingency which had not happened before the first dividend, but for unliquidated damages—and the discharge therefore did not release it.

2. Fifth plea, good as to the first count, but bad as to the second and third counts; for the plaintiffs, as those counts shewed, had only an equity of redemption, and the right to sue on the covenants would not pass with it to their assignee.

A plea bad in part is not necessarily bad altogether, but it may be held on demurrer good as to some counts and bad as to others; and the pleas were so held in this case.

The fourth plea was held not objectionable on demurrer, as not admitting and avoiding the plaintiff's claim, but referring to it as the plaintiffs' alleged claim, if any.

DEMURRER—Declaration—First count, on the covenant for right to convey, contained in a conveyance dated

dated the 18th January, 1858, by defendant to plaintiffs, expressed to be made in pursuance of the Act respecting short forms of conveyances, of lot 2, in the 7th concession, and lots 2 and 7 in the 8th concession, of Walsingham. Breach: that at the time of making the said indenture, by reason of an act of the defendant—to wit, a certain indenture before then duly executed and delivered by the defendant to one Henry Stewart, whereby the said defendant, for the consideration therein expressed, did grant and convey to the said Henry Stewart, the said lot 2, in the 7th concession of the township of Walsingham—the said defendant had not at the time of the making of said covenant, good rightful power and absolute authority to convey the said last mentioned parcel of land to the plaintiffs in manner aforesaid, and according to the true intent of the said indenture.

Second count, on the covenant for quiet possession in the indenture referred to in the first count. Breach: that before the making of the said covenant, the defendant had executed a mortgage of lot 2 in the 7th concession of the township of Walsingham to one Henry Stewart, in fee, to secure £250 and interest, which was in full force at the time of the making of the indenture in this count first mentioned; and after the making of the covenant in this count mentioned, the said mortgage money being unpaid, the said Henry Stewart, lawfully claiming by, from, and under the defendant, filed his bill of complaint in the Court of Chancery for the Province of Ontario against the plaintiffs and others, for the foreclosure of his said mortgage; and such proceedings were thereupon had, that the said Henry Stewart obtained from the said Court a decree of foreclosure against the plaintiffs in respect to and so far as regards the said lot 2, in the 7th concession of the township of Walsingham aforesaid; and the plaintiffs were thereby put to great expense, lost the said last mentioned parcel of land, and were forever deprived of their possession and enjoyment of the same, and have been otherwise greatly damaged.

Third count : that the defendant being possessed of lot 2 in the 7th concession of Walsingham, did, as security for the loan of £250 of sterling money of Great Britain, equal in value to \$1,238.89, of lawful money of Canada, before then advanced by one Henry Stewart to the defendant, grant and convey by deed to the said Henry Stewart the said land in fee, subject to a proviso for redemption on payment of the said sum of £250, with interest thereon at the rate of seven per cent. per annum till paid, payable on days and times long since past ; and the defendant, after the making of the said mortgage deed, and before the day for the payment of the principal money aforesaid had elapsed, did by deed grant and convey his equity of redemption of, in, and to the said land, with others, to the plaintiffs in fee, for the consideration of the sum of \$22,400, before then advanced and paid by the plaintiffs to the defendant, with interest as therein mentioned, payable at a day now past ; and in the said last mentioned deed the defendant covenanted with the plaintiffs to pay off and discharge the first mentioned mortgage, and of and from the same to indemnify and save harmless the plaintiffs in their possession and enjoyment of the said parcel of land and every part thereof. And all conditions were performed, &c., to entitle the plaintiffs to the performance of the defendant's said covenant, and to maintain this action for the breach hereinafter alleged ; yet the defendant did not pay off and discharge the said first mentioned mortgage, nor of and from the same indemnify and save harmless the plaintiffs in their possession and enjoyment of the said land, but, on the contrary thereof, wholly omitted so to do ; whereupon the said Henry Stewart filed his bill in the Court of Chancery against the plaintiffs and others for the foreclosure of the said mortgage ; and such proceedings were thereafter had, that the said Henry Stewart obtained a decree of foreclosure against the plaintiffs in respect of the said mortgage on the said parcel of land, and the plaintiffs thereby lost and were forever deprived of their mortgage security secondly above mentioned, and lost the

possession and enjoyment of the said parcel of land, and were put to costs and expenses in respect of the said foreclosure proceedings, and have been otherwise greatly damaged.

Fourth count: usual money count.

Fourth plea: that after the time alleged in the said declaration as the time at which the defendant became indebted and liable to the plaintiffs, as in said declaration is alleged, and after the Insolvent Act of 1864 became and was in force, the defendant, being insolvent within the meaning of the said Act, did make an assignment of all his property for the benefit of his creditors, including the plaintiffs, under the said Act, and in the schedule of liabilities of the defendant annexed to the said assignment as required by the said Act, and in a supplementary schedule furnished by the defendant previous to his discharge, the alleged claim of the plaintiffs, which was then, if they ever had any claim, provable against the estate in insolvency of the defendant, was included; and the said defendant did not within one year from the date of the said assignment, obtain from the proportion of his creditors required by the said Act a consent to his discharge, or the execution of a deed of composition and discharge under the provisions of the said Act; and having in all respects and ways complied with the requirements and provisions of the said Act, did afterwards, to wit, on the 7th day of July, 1866, duly obtain from the Judge of the County Court of the United Counties of York and Peel, being the Court in which the proceedings under the said assignment, were carried on, an absolute and unconditional discharge under the said Act from the claims of his creditors, including the plaintiffs, which discharge was also duly confirmed by the said Judge. And the defendant says that by virtue of said discharge, and the provisions of the Insolvent Act of 1864, the defendant was and is discharged from all liability and from all indebtedness in the said declaration mentioned.

Fifth plea to the first, second, and third counts: that after the date of the alleged deed in the declaration mentioned,

in which the alleged covenants respectively of the defendant are alleged to be contained, and before the alleged respective breaches of the said covenants respectively by the defendant, the plaintiffs did, by deed, grant and convey all their said estate in the said lands in the said first, second, and third counts of the declaration mentioned, as well as their right, title, and interest in the possession thereof, to one Edmund Deedes, with the usual absolute covenants for title, to secure a certain sum of money therein mentioned ; and the said plaintiffs have not since got back or became seized of, and they had not at the commencement of this action got back or become seized of their former or any estate, right, or interest in the said lands in the said first, second, and third counts of the declaration mentioned, or any part thereof, whereby the causes of action in the said first, second, and third counts respectively, of the said declaration mentioned, could not and did not accrue to the plaintiffs ; and at the commencement of this action the plaintiffs had no such cause or causes of action as are mentioned in the said first, second, and third counts of the declaration, or any or either of them, against the defendant, by reason of the said alleged covenants, or any or either of them.

The plaintiffs demurred to the fourth plea, on the grounds that it was pleaded to the whole declaration, and was no answer to the first, second, or third counts thereof, the causes of action in those counts mentioned not being such as would be barred or discharged by the order of discharge under the said plea mentioned.

The plaintiffs also demurred to the fifth plea, because it was pleaded to the first, second, and third counts of the declaration, and was no answer to the causes of action in the first count mentioned, the covenant therein declared upon having been broken as soon as made ; and because it was no answer to the causes of action in the second and third counts mentioned, the subsequent conveyance by the plaintiffs of the equity of redemption in the said lands

not depriving them of their right to sue on the covenant declared upon.

Joinder.

During Easter term, 1873, *Harrison*, Q. C., supported the demurrers. The fourth plea is bad because it does not admit a cause of action while it seeks to avoid it. The language used in the plea is "the cause of action, if any." *Perdue v. The Corporation of the Township of Chingua-cousy*, 25 U. C. R. 61, is in point. The portions of the Insolvent Act of 1864 which apply to this plea are sec. 5, sub. 3 and 4; and sec. 9, sub. 3. A contract depending upon a contingency is not included in a discharge under the Imperial Insolvency Acts: *Young v. Winter*, 16 C. B. 401; *Warburg v. Tucker*, 16 C. B. 418, note (a), 5 E. & B. 384; *Maples v. Pepper*, 18 C. B. 177; *Boyd v. Robins*, 5 C. B. N. S. 597; *Kent v. Thomas*, L. R. 6 Ex. 612, and the cases there collected; *Johnson v. Skafte*, L. R. 4 Q. B. 700; *Robson on Bankruptcy*, 2nd Ed., 215, 218.

The fifth plea is no answer to the first count, the covenant declared upon having been broken as soon as made. The following cases apply to covenants of this kind: *Scott v. Fralick*, 6 U. C. R. 511; *Gamble v. Rees*, 6 U. C. R. 396; *Huyck v. McDonald*, 3 O. S. 292; *Rees v. Strachan et al.*, 14 U. C. R. 53; *Proctor v. Gamble*, 16 U. C. R. 110; *Cuthbert v. Street*, 9 C. P. 386; *Rowe v. Street*, 8 C. P. 217; *Harry v. Anderson*, 13 C. P. 276; *Trust and Loan Co. of Upper Canada v. Covert*, 30 U. C. R. 239; *Thornton v. Court*, 3 De G. McN. & G. 293. It was formerly held that an assignee by estoppel could not maintain an action on the covenant: *Noke v. Awder*, Cro. Eliz. 373, 446; *Platt on Covenants*, 525; but modern authority is to the contrary: *Andrew v. Pearce*, 1 B. & P. N. R. 158; *Whitton v. Peacock*, 2 Bing. N. C.; *Earl of Portmore v. Dunn*, 1 B. & C. 694; *Pargeter v. Harris*, 7 Q. B. 708; *Sugden on Vendors*, 14th Ed., ch. 15, sec. 1, sub-sec. 19, 25 *et seq.*; *Rawle on Covenants*, 4th Ed., 365, note, 357, 371; *Nesbit v. Montgomery*, 1 Tay. N. C. 86; *Nesbit v. Brown*, 1 Dev. Eq., N.

C. 30; *Beddoe v. Wadsworth*, 21 Wend. 123; *Martin v. Gordon*, 24 Geo. 536.

Ferguson, contra. The authorities cited shew that the fourth plea is good. As to the fifth plea, see *White v. White*, 3 Metc. 81; *Kellogg v. Wood*, 4 Paige 578; *Rawle* on Covenants, 4th Ed., 451.

RICHARDS, C.J., delivered the judgment of the Court.

The first count, as we understand it, alleges, amongst other things, the conveyance by defendant to plaintiff of lot 2 in the 7th concession of Walsingham, in fee, with a covenant that, notwithstanding anything he had done to the contrary, he had good right to convey the said lot to the plaintiffs, their heirs and assigns, to their own sole use forever.

The breach alleged is, that before he executed the deed to the plaintiffs he had by a certain indenture granted and conveyed to Henry Stewart the said lot, and he had not, at the time of the making of the said covenant, good right-ful power and authority to convey the said lot to the plaintiffs, in manner aforesaid.

Under the allegations above contained nothing would seem to have passed by the deed; it was a covenant in gross, and broken as soon as made. Why would not the plaintiffs have a right to bring the action, and recover all their damages at once?

There may be a difficulty as to the amount of damages, on account of the consideration money in the mortgage being greater than the probable value of this lot of land, and the mortgage covering other lots. If the plaintiffs were to prove against the defendant's estate, the sum for which they would prove as to this covenant, in this form, and in relation to this lot, would seem to be uncertain.

The second count sets up a covenant that the plaintiffs might at all times enter and quietly hold and occupy the lands thereby conveyed, or intended so to be, without any let, trouble, denial, or eviction of the defendant, or any person claiming under him.

The breach alleged is, that before the defendant made the covenant he had executed and delivered a deed of bargain and sale, by way of mortgage, of lot 2 in the 7th concession of Walsingham to Henry Stewart, to hold to him and his heirs forever, subject to a proviso for redemption upon payment by the defendant to Stewart of £250, and interest as therein provided, which said bargain and sale was in full force at the time of making the indenture to the plaintiffs; and after the making of the said covenant, the said mortgage money being unpaid, Stewart, lawfully claiming under the defendant, foreclosed against the plaintiffs as to the said lot 2, and the plaintiffs were thereby put to great expense, and lost the said parcel of land, and were forever deprived of the possession and enjoyment of the same, and have otherwise been greatly damaged.

It appears clearly from this that at the time the defendant made the mortgage he, in fact, had not any estate in the land. He had only an equity of redemption, (quære, if the mortgage money were not due, and the condition still remaining, what sort of an estate would he have?) and that was all he conveyed. In this view no estate passed to the plaintiffs, and it would be simply a covenant in gross, which they could sue on as soon as deprived of their right of entry and enjoyment of the land by the foreclosure, and would not pass in law to a purchaser under them.

The fourth count alleged the conveyance of this lot to Stewart in consideration of £250 sterling, by deed, in fee, subject to redemption on payment of the said sum of £250 sterling, with interest at seven per cent., payable at days and times long since passed; and that the defendant after making the mortgage deed, and before the day for the payment of the principal sum had elapsed, conveyed the equity of redemption in the said lot of land with other lands to the plaintiffs, in fee, in consideration of \$22,400, with interest, and in the last mentioned deed covenanted with the plaintiffs to pay off and discharge the first mentioned mortgage, and of and from the same to indemnify and save harmless

the plaintiffs in the possession and enjoyment of the said parcel of land and every part thereof. Breach, that defendant did not pay off and discharge the said mortgage, nor indemnify and save harmless the plaintiff from the same in the possession and enjoyment of the said land, but omitted so to do; and Henry Stewart filed his bill in the Court of Chancery against the plaintiffs and others, and obtained a foreclosure against the plaintiffs in respect to the mortgage on the said parcel of land, and the plaintiffs lost and were deprived of their mortgage security secondly above mentioned, and lost the possession and enjoyment of the said parcel of land, and were put to costs and expenses in respect of the said foreclosure proceedings.

The covenant to pay off the mortgage is one which, according to *Lethbridge v. Mytton*, 2 B. & A. 773, can be sued on at law, and the full amount mentioned in the mortgage be recovered.

The fourth plea, of discharge under the Insolvent Act, is demurred to.

In argument it was objected that the plea does not admit a cause of action and then avoid it. It says the alleged claim of the plaintiffs, "if they ever had any claim" which was then provable against the estate in insolvency of the defendant, was included in the schedule and amended schedule filed by him previous to his discharge, and the defendant obtained an unconditional discharge, under the Act, from the claims of his creditors, including the plaintiffs.

It speaks of the claim as "the plaintiffs' alleged claim, if any," and *Perdue v. Chinguacousy*, 25 U. C. R. 65, is referred to as shewing the plea bad on this account. I doubt if the plea would be held bad on that account now. If the plea is embarrassing it might be amended; but if good in other respects, the objection not being taken as a ground of demurrer, we do not think we should give effect to it.

The more formidable objection is, that it is pleaded to the whole declaration, and is no answer to the first, second, or third counts.

The question is as to the nature of the claim which the plaintiffs could have made against the defendant's estate.

The introductory part of the plea states, that after the time alleged in the declaration as the time at which the defendant became indebted and liable to the plaintiff, as in the declaration is alleged, and after the passing of the Insolvent Act, he, the defendant, became insolvent, and made an assignment of all his property for the benefit of his creditors, including the plaintiffs; and in the schedule of liabilities annexed to the assignment, and in a supplementary schedule furnished by the defendant previous to his discharge, the alleged claim of the plaintiffs, which was then, if they ever had any claim, provable against the estate in insolvency of the defendant, was included; and he afterwards obtained an unconditional discharge from the claims of his creditors, including the plaintiffs, which discharge was duly confirmed; and by virtue of such discharge, and the provisions of the Insolvent Act of 1864, the defendant was and is discharged from all liability and all indebtedness in the declaration mentioned.

The first question to be considered is, whether the demand claimed in the first count of the declaration is one that was provable against the defendant's estate.

The words of the Insolvent Act of 1864, sec. 9, sub-sec. 3, referring to the discharge of the debtor are, that it "absolutely frees and discharges him from all liabilities whatsoever, (except such as are hereafter specially excepted) existing against him, and provable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplemental list of creditors furnished by the insolvent previous to such discharge, * * * whether such debts be exigible or not at the time of his insolvency, and whether direct or indirect."

Sec. 5, sub-sec. 2, provides that, "*All debts due and payable* by the insolvent at the time of the execution of the deed of assignment, * * * and *all debts due but not then actually payable*, subject to such rebate of interest as

may be reasonable, shall have the right to rank upon the estate of the insolvent; and any person then being as a surety or otherwise *liable* for any debt of the *insolvent* who subsequently pays such debt, shall stand in the place of the original creditor."

Sec. 5, sub-sec. 3, is, "If any creditor *claims upon a contract dependent on a condition or contingency, which does not happen previous to the declaration of the first dividend*, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it should be made to appear to the Judge that such reserve will probably retain the estate open for an undue length of time, he may, unless an estimate of the value thereof be agreed to between the claimant and the assignee, order the assignee to make an award upon the value of such contingent or conditional claim, and thereupon the assignee shall make and award, * * subject to appeal, * * and in every case the value so established or agreed to, shall be ranked upon as a debt payable absolutely."

Sec. 5, sub-sec. 4, provides that, "No dividend shall be paid to any creditor holding collateral security from the insolvent for his claim, until the amount for which he shall rank as a creditor on the estate, as to dividends therefrom, shall be established, as hereinafter provided."

Sec. 5, sub-sec. 5, requires that, "A creditor holding security, * * shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value on such security; and the assignee, * * may either consent to the retention of such security by the creditor at such specified value; or he may require from such creditor an assignment and delivery of such security, at an advance of ten per centum upon such specified value, to be paid by him out of the estate so soon as he has realized such security; * * and the difference between the value at which the security is retained or assumed, and the amount of such claim of the creditor shall be the amount for which he shall rank."

Under the English Bankruptcy Act of 1849, 12 & 13 Vic. ch. 106, sec. 200, the certificate discharged the bankrupt from "all debts due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy."

Under the English Act 24 & 25 Vic. ch. 134, sec. 161, the order of discharge discharged the bankrupt from "all debts, claims, or demands provable under his bankruptcy, save as herein otherwise provided."

Under the English Statute of 1849, 12 & 13 Vic. ch. 106, from sec. 172 to 178, the kind of debts and demands provable under the commission are stated.

Under sec. 172, debts contracted but not due at the time of the bankruptcy are provable.

Under sec. 173, any person who has become surety or liable for any debt of the bankrupt, if he shall have paid the debt, may rank in place of the party to whom he paid, or if the creditor did not prove, the surety may prove himself, not disturbing the former dividend.

Under sec. 174, the obligee in any bottomry or *respondentia* bonds, and the assured in any policy of assurance shall be admitted to claim, and after the loss or contingency shall have happened to prove his debt or demand in respect thereof.

By sec. 175, an annuity creditor, by whatever assurance the sum might be secured, whether any arrears of annuity were due at the time of the bankruptcy or not, may prove for the value of the annuity, which the court shall ascertain.

Sec. 176, provides that a party entitled to an annuity granted by a bankrupt, shall not sue any person who is a collateral surety for payment of the annuity, until the annuitant ranks on the estate for the amount; and when the surety has paid it, he may rank in place of the annuitant.

Sec. 177, provides that, if the bankrupt has "contracted *any debt payable on a contingency*, which shall not have happened," the person with whom the bankrupt has contracted may, if he thinks fit, apply to the court to set a

value on such debt, and admit the party to prove for the value.

Sec. 178, provides that, if the bankrupt has contracted a "*liability to pay money upon a contingency which shall not have happened,*" and the demand in respect whereof shall not have been ascertained before the bankruptcy, in every such case, if such liability be not provable under any other provision of this Act, the person with whom such liability is contracted shall be admitted to claim for such sum as the Court may think fit.

Under the Imperial Statute 24 & 25 Vic. ch. 134, a creditor, amongst other things, may prove for the following claims :

Sec. 151. For debts payable by instalments.

Sec. 153. If the bankrupt be liable by reason of any contract or promise, *to a demand in the nature of damages*, which have not been and cannot be otherwise liquidated or ascertained, the Court shall direct the damages to be ascertained by a jury, "and the amount of damage when assessed, shall be provable as if a debt due at the time of the bankruptcy."

Sec. 154. If the bankrupt be liable "by reason of any contract or promise to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount."

Under the last English Bankruptcy Act, 32 & 33 Vic. ch. 71, sec. 31, it is provided that, "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy.

* * * Saye as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, * * * shall be deemed to be debts provable in bankruptcy, and

may be proved in the prescribed manner before the trustee in the bankruptcy. An estimate shall be made * * * of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, *or for any other* reason, does not bear a certain value. * * * And the Court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability shall be deemed to be a debt not provable in bankruptcy; but if the Court think that the value is capable of being fairly estimated, it may direct such value to be assessed, * * * and the amount of such value when assessed shall be provable. * * * 'Liability' shall, for the purposes of this Act, include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as a matter of opinion."

Under section 49, "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy, with the exception of—1. Debts due to the Crown; 2. Debts * * * of any person for any offence against any statute relating to any branch of the public revenue, or at the suit of the sheriff, * * * on a bail bond entered into for the appearance of any person prosecuted for any such offence."

There is no doubt, I think, that the insolvent under our statute can only be released from those debts that are provable under the statute.

The effective words of the Insolvent Act of 1864, sec. 9, sub-sec. 3, are that, "the consent of the creditors * * after his estate has been put into compulsory liquidation, absolutely frees and discharges him from all liabilities whatsoever, * * existing against him *and provable against his estate.*"

The debts that can rank on the estate are, under sec. 5, sub-sec. 2, "all debts due and payable by the insolvent at the time of the executing the deed of assignment, * * and all debts due, but not then actually payable." This sub-section also contains provision as to sureties.

Sec. 5, sub-sec. 3, provides that when the creditor claims "upon a contract *dependent on a condition or contingency* which does not happen previous to the declaration of the first dividend, a dividend shall be reserved until the contingency is determined;" but if the reservation would retain the estate open for an undue length of time, unless the amount is agreed upon between the claimant and assignee, the Judge orders the assignee to make an award on the value of the claim, and the value agreed upon as established shall be ranked upon as a debt payable absolutely.

Under the Imperial Statute 6 Geo. IV., ch. 16, sec. 56, it is provided, "If any bankrupt shall, before the issuing of the commission, have contracted any debt payable on a contingency which shall not have happened before the issuing of the commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and admit such person to prove the amount so ascertained, and to receive dividends thereon."

Before the Statute 6 Geo. IV., ch. 16, under a covenant to pay a sum certain on demand or request, and no demand or request before the bankruptcy, the amount could not

be proved as an absolute debt, nor as a contingent debt, and it seems clear that there could be no proof under a fiat upon a covenant to do a thing not being the payment of money, such as to build a house or the like, even though the covenant were broken before the act of bankruptcy. See the cases referred to in *Arch. Bankrupt Law*, Ed., of 1869, p. 126.

Our statute, it seems to us, really carries the matter no further than the Act of 6 Geo. IV., ch. 16, for the covenant sued on in the first count of the declaration, is not in relation "to a debt due or payable," nor to "a debt due, but not then actually payable," nor is it "a contract dependent on a condition or contingency;" but substantially to indemnify the plaintiffs for damages which they may shew they have sustained by the breach of the covenant as to his, defendant's, having a good right to convey in fee.

Here, the amount of the damages cannot be fixed by calculation, for it must depend on circumstances. The consideration mentioned in the deed is for several lots of land, and the covenant is only alleged to be broken as to one lot; and the damages for the defective title as to that particular lot must necessarily be the subject of enquiry and investigation before a jury.

Besides, this cannot be said to be a claim in relation to a contingency, for, according to the declaration and plea, the breach of this covenant took place before the assignment in insolvency was made. *Green v Beckwell*, 8 A. & E. 701, is a leading case under the law as it stood before 1859.

Under the Act of 1859, a liability which resulted in damages was held not to be within the statute: *Warburg v. Tucker*, 5 E. & B. 384, E. B. & E. 914.

The decisions under that statute turned on the words, "liable to pay money on a contingency." The words of our statute already cited, refer to a contract "dependent upon a condition or contingency."

Here the condition or contingency had happened before the assignment was made; and if the plaintiffs could have

proved at all, it would not be "for a debt due and payable, or a debt due but not then payable," but in respect of damages for this breach of covenant.

We fail to see how the plaintiffs' claim under the first count could have been proved against the defendant's estate in insolvency.

The same objections would seem to prevail as to proving against the defendant's estate under the second count. The amount of damages must be ascertained by evidence, as this breach of the covenant in this count mentioned only relates to the one lot. The plea alleges that, in effect, the plaintiffs' claim arose before the assignment in insolvency, and we cannot see how the plaintiffs could claim on the estate for the uncertain damages which had arisen under this covenant.

The third count, if the claim were only as to the non-payment of the mortgage money of £250 sterling to Stewart, might perhaps have been provable against the estate of the insolvent, but as it is for damages in addition to this for being deprived of the possession of the mortgaged premises, and also for costs they were put to, we fail to see how the amount could be ascertained under our statute.

The English Acts of 1861 and 1869, certainly the latter, already cited, contain unmistakable enactments as to the kind of demands provable on an estate, and the provision in the last Act as to claims the value of which cannot be fairly estimated, shews that under the scheme of the Bankrupt Acts prior to the Act of 1869, the intention was to provide for debts and claims in the nature of distinct liabilities, or such as could be turned reasonably into such liabilities, without estimating damages not capable of being ascertained by fixed rules, or only assessable by a jury, or as matter of opinion.

The plea is a good answer to the fourth count, but being pleaded to the whole declaration, is bad as to the three counts. It must be considered distributively, and is good as to the fourth count.

The fifth plea is to the three first counts, and alleges

that before the breaches alleged in those counts by the defendant, the plaintiffs, by deed, conveyed all their estate in the lands in those counts mentioned, as well as the right, title, and interest in the possession of the lands, to one Edmund Deedes, with an absolute covenant for title, to secure a certain sum ; and they had not at the commencement of this action got back or become seized of their former or any estate, right, or interest in the said lands, in the said three counts of the declaration mentioned, or any part thereof, whereby the causes of action in the said three counts of the declaration could not and did not accrue to the plaintiffs at the commencement of this suit.

The plea might have been good if confined to the first count. It does not appear from that count that the estate conveyed may not have been the legal estate, which may have passed an interest, but not to the extent covenanted for in the deed ; and there might have been something contained in the deed from the defendant to Stewart, which made the title less perfect than the defendant had covenanted he had a right to grant, and did purport to grant.

The right to sue on such a covenant, under the authority of *Kingdon v. Nottle*, 4 M. & S. 53, would pass from the plaintiffs to the parties to whom they had had conveyed the land.

As to the second and third counts, these counts themselves shew that the defendant, when making the conveyance to the plaintiffs, had only an equitable estate in these lands ; and that these covenants were covenants in gross, and did not pass to the assignee of the plaintiffs. All that was conveyed to them, and all that was conveyed by them, was the equity of redemption, and no estate on which the covenants that run with the land passed by the conveyance of such interests.

In carrying out this doctrine the practice of the Court of Equity is, that when the owner of the equity of redemption finds it necessary to sue on the covenants which run with the land, the action is brought in the name of the owner of the legal estate for the benefit of the equitable title.

Thornton v. [Court], 3 DeG. McN. & G. 293, 17 Jur. 151, shews the adherence of Courts of Equity to the rule, that covenants for title, &c., run with the legal title.

In *Phillips v. Phillips*, 8 Jur. N. S. 145, 5 L. T. N. S. 655, Lord Westbury lays down the rule in equity.

Athenæum Insurance Co. v. Pooley, 3 DeG. & J. 294, 9 Jur. N. S. 129, 33 L. T. 247; *Riddell v. Riddell*, 7 Sim. 529, and the cases cited in *Dart on V. & P.*, 4th ed., 714, may be referred to.

The plea purports to answer the cause of action in the first three counts, and only answering that in the first count is bad as to the other two counts.

Johnson v. Skafte, L. R. 4 Q. B. 700, is decided under the English Act of 1861, and under the section there referred to when the bankrupt was liable by reason of a contract or promise to a demand in the nature of damages which have not been or cannot be otherwise liquidated or ascertained, the Court might direct an enquiry.

Metcalf v. Hanson, L. R. 1 H. L. 242, decides that a covenant to pay renewal premiums on a life policy is an absolute covenant, and does not constitute a liability to pay money on a contingency within the meaning of sec. 178 of Imp. Stat. 12, & 13 Vic., ch. 106. Many of the previously decided cases are referred to in the argument.

Kent v. Thomas, L. R. 6 Ex. 312, is a case under the English Act of 1849, in which many of the previous cases are referred to.

The old doctrine of pleading, that a plea bad in part is bad in the whole, seems to be adopted by the Court of Common Pleas in England, in *Gabriel v. Dresser*, 15 C. B. 622. But Alderson, B., in the Court of Exchequer, in *Blagrove v. The Bristol Waterworks*, 1 H. & N. 387, says: "This raises the last question whether a plea can be good in part and bad in part. It is supposed that *Gabriel v. Dresser*, 15 C. B. 622, decided that if bad in part it was bad in toto. But we do not understand that case so to decide; and think that the plea constitutes a good answer to the second, but not to the other counts, and that there must be judgment accordingly."

In *Goldsmid v. Hampton*, 5 C. B. N. S. 94, at p. 103, where *Blagrave v. The Bristol Waterworks Co.* was referred to, Willes, J., said, "A demurrer is not divisible."

In that case, as reported in 22 L. J. C. P., at p. 287, Willes, J., said, referring to *Blagrave v. The Bristol Waterworks Co.*, "That is contrary to the decisions of this Court."

Williams, J., said, "In this case we think you may amend at once by confining the replication to the first plea." The reporter adds, this was done accordingly.

No doubt the last case in the Common Pleas is to the effect that on demurrer a plea bad in part is bad in the whole. We think, however, the decision referred to in the Exchequer not unreasonable, as to construing a plea one way at the trial, and another way for purposes of demurrer, and think it will be more in accordance with the spirit of our own later legislation to apply the principle to the plea when demurred to, and hold it good as applicable to counts to which it may be properly pleaded, and bad as to those to which it cannot be so pleaded (a).

Judgment accordingly.

HALL ET AL. V. GRAND TRUNK RAILWAY COMPANY.

R. W. Co.—Duty and liability as common carriers.

Defendants received 2000 bundles of hoop iron to be carried to London and delivered at their station there to the plaintiff. On its arrival, the plaintiffs having no agent in London and living in Montreal, defendants sent to them there advice notes of the arrival, and unloaded the iron in their yard, where it remained for nearly three weeks and was injured by rust and exposure. *Held*, that the defendants as common carriers were not liable.

Eighteen bundles were missing, and defendants' officers, not having checked the number taken out of the cars, could only say that if the 2000 bundles arrived there it was all placed in the yard, and must have been stolen from there. *Held*, that the defendants were liable for the eighteen bundles.

DECLARATION. The first count alleged that the plaintiffs delivered to the defendants, as common carriers, 2000 bun-

(a) See *Gould v. Gzowski*, 17 U. C. R. 52.

dles of hoop iron, to be safely carried from Portland to London, and there delivered for the plaintiffs for reward, &c.; and that the defendants did not safely convey and deliver, but so negligently did so that it was damaged and spoiled.

Second count: the same as first count, and alleging the non-delivery to the plaintiffs within a reasonable time, and that a reasonable time elapsed and that the defendants did not take care of the hoop iron, and thereby the same was lost.

Pleas: 1. Not guilty. 2. Denying receipt of the goods on the terms alleged.

3. To the first count: that the defendants safely carried the iron from Portland to London: that on the arrival of the same at London neither the plaintiffs nor any one on their behalf were ready or willing to receive the same: that the defendants on its arrival there further gave notice of such arrival to the plaintiffs, who then resided and were in Montreal, and requested them to accept and receive the goods or to advise the defendants to whom to deliver them: that the defendants, after keeping them a reasonable time after their arrival at London in the cars in which they were carried, were obliged to unload and place the goods in the yard of the defendants at London, the defendants having no warehouse room to store the same; and that the goods were unloaded without damage or injury thereto: that the plaintiffs for a long and unreasonable time after the notice, &c., delayed and neglected to accept the goods or to advise the defendants to whom to deliver them, and there was no one at London to whom the defendants could have delivered the same: that at the time aforesaid and during all that time and always from the arrival of the goods at London, the defendants were ready and willing to deliver the same according to their undertaking in that behalf, but that they were prevented from delivering the goods, &c., for the reasons stated in the plea, and not by or through the neglect or default of the defendants; and that during the said long or unreasonable time the said goods remained in the yard of the defendants the same became damaged from exposure to the weather, and were so dam-

aged in the said yard after the carrying thereof was ended, and after their arrival at London and their removal from the said cars as aforesaid, and not before.

The case was tried at the Fall Assizes of 1873, at London before S. Richards, Esquire, Q.C., sitting for Gwynne, J.

The bill of lading shewed that the 2000 bundles of hoop iron were shipped from Liverpool, England, by the steamer *Prussian*, to be delivered at Portland "unto the Grand Trunk Railroad Co., and by them to be forwarded thence per railway to the station nearest to London, Ontario, and at the aforesaid station delivered to Messrs. J. N. Hall & Co., (the plaintiffs) or to their assignees."

The jury found a verdict for the plaintiff for the value of the iron.

The facts are sufficiently stated in the judgment.

In Michaelmas Term, 1873, *Becher*, Q.C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit, pursuant to leave reserved; or to enter a verdict for defendants; or to reduce the verdict to \$44.03, the value of eighteen bundles of the iron carried by defendants—the Court to draw inferences of fact as a jury.

During the same term *Bayly* shewed cause. The facts shew that the iron when it arrived at London was thrown into an open common, which the defendants call their yard, which is wet nine months of the year, and which could not fail to injure the iron. It was in fact rusted and run over by waggons. [RICHARDS, C. J.—Were the defendants bound to take charge of it at all after its arrival at their station?] Yes, until it was safely warehoused. Here it was unloaded improperly before there was an opportunity for the plaintiffs to send any directions about it, even by telegraph, after notice of its arrival. At all events we are entitled to the eighteen missing bundles. In *Shepherd v. Bristol and Exeter R. W. Co.*, L. R. 3 Ex. 189, Martin, B., refers, at page 196, to a rule laid down by Dr. Redfield as to the termination of the carrier's responsibility. That rule, he says, is "that the responsibility of the

carrier, as such, does not terminate until the owner or consignee, by watchfulness, had, or might have had, an opportunity to remove his property, and more especially when the goods arrived out of time, in consequence of which it became impossible for the owner to remove them. This rule seems to me to be founded upon reason and justice and good sense." In this case also it was impossible for the plaintiffs to have attended to have received the goods before they were unloaded. The bill of lading required that the goods should be delivered to the plaintiffs, and the placing the goods in the yard was not a proper delivery: *Bourne v. Gatcliffe*, 3 M. & G. 643, 690, 7 M. & G. 850, 11 Cl. & Fin. 45; *Hyde v. The Navigation Co. from the Trent to the Mersey*, 5 T. R. 389, 396; *Bowie v. The Buffalo, Brantford, and Goderich R. W. Co.*, 7 C. P. 191; *O'Neill v. The Great Western R. W. Co.*, 7 C. P. 203; *Inman v. The Buffalo and Lake Huron R. W. Co.*, 7 C. P. 325. He also referred to *Gill v. The Manchester, Sheffield, and Lincolnshire R. W. Co.*, L. R. 8 Q. B. 186; *Phillips v. Clarke*, 2 C. B. N. S. 156; *McKay v. Lockhart*, 4 O. S. 407. If necessary the plaintiff asks to add a count in trespass.

Becher, Q. C., contra. There is no count in tort here, and it is impossible in this case to supply it. There is no duty to warehouse the iron cast on the defendants; they are only sued as carriers, and it is clear that the action cannot succeed: *Penton v. The Grand Trunk R. W. Co.*, 28 U. C. R. 367. Baron Martin dissented from the judgment of the Court in *Shepherd v. The Bristol and Exeter R. W. Co.*, L. R. 3 Ex. 189, already cited. See also *Hood v. The Grand Trunk R. W. Co.*, 20 C. P. 163; *Aldridge v. The Great Western R. W. Co.*, 15 C. B. N. S. 582; *Re Webb et al.*, 2 Moore 500.

MORRISON, J., delivered the judgment of the Court.

We have carefully gone over all the evidence given on the trial in this cause, and we are of opinion that the defendants are entitled to our judgment, except as to the value of the eighteen bundles of hoop iron not delivered.

The defendants are charged as common carriers, and the evidence discloses the following facts:—The goods were consigned deliverable to the plaintiffs at the defendants' station at London; the plaintiffs did not reside or have a place of business there, nor any agent to receive, or to whom the defendants could on its arrival there deliver the iron. The railway officials at London, on the arrival of the hoop iron at that station, upon enquiry learned that the plaintiffs resided at Montreal, and they sent to them the usual advice notes of the arrival of the goods, which advice notes the plaintiffs received. No one calling at the station to take delivery, after the usual period that goods are allowed to remain in the cars, they were unloaded and placed in the defendants' yard or premises contiguous to the railway, that being the only as well as the usual place for such goods, and their warehouse and the platform of their station being at the time quite full. The evidence shews that the hoop iron arrived in good order, and was so when taken out of the cars and deposited in the place where it was put. The goods remained there about ten days, (during all this time no communication or directions were made or sent to the defendants as to the hoop iron), until a person acting as the agent of the plaintiffs' vendee, to whom in the meantime the plaintiffs sold the hoop iron, examined it and reported to his principal that it was damaged, and the result of that information was a reduction in the price of the iron to the plaintiffs' vendee; and after another ten days elapsed the agent already mentioned produced to the defendants, at London, the original bill of lading endorsed by the plaintiffs, with an order to deliver it, which was done, less eighteen bundles unaccounted for.

As we have stated, the evidence shews that the iron arrived at the station and was removed from the cars in good order, and that any damage it may have received is attributable to the hoop iron being exposed, in the place where it was deposited, to the weather and rain. Under these circumstances we do not think that the plaintiffs are

entitled in this action to recover for any injury it so received.

It is, we think, clear and well settled from numerous cases—and among them the cases of *Bowie v. Buffalo, Brantford, and Goderich R. W. Co.*, 7 C. P. 191; *O'Neil v. The Great Western R. W. Co.*, 7 C. P. 203; and *Inman v. The Buffalo and Lake Huron R. W. Co.*, 7 C. P. 325—that the duty of the defendants as common carriers was fulfilled and ceased when they deposited the goods at the London station, to which place they were consigned for delivery.

If the consignee of goods, or some person on his part, is not at a station to take delivery of the goods, or the consignee is not known there or cannot be found, it is, we suppose, in such a case, the duty of the defendants to deposit the goods in a place of safety, and ready to be delivered to the parties when called for, and it may be their duty to take care of them for a reasonable time; but for whatever may happen to the goods after they were discharged from the cars and deposited in a warehouse or other place, the liability of the defendants, if any, would be that of warehousemen and not as carriers.

The mode of transportation by railway is essentially different from that of waggons or other vehicles, and it is not adapted to a delivery at the place of residence or business of the consignee.

No doubt the defendants may extend their liability as common carriers beyond their stations, by undertaking to carry the goods from their line and deliver to the consignee at any specified place, but that is not the case here, the terms of the bill of lading under which these goods were carried being to forward them to the station nearest to London, and at that station deliver the goods to the plaintiffs or their assignees, &c.

As said by Draper, C. J., in *Inman v. Buffalo and Lake Huron R. W. Co.*, above cited, "Looking at the nature of their business, &c., the necessity of immediate delivery out of their cars is apparent, and the terminus of the transport being reached, the duty of common carriers is fulfilled

by placing them in a safe place, alike safe from the weather and from the danger of loss or theft ; and whatever the responsibility the defendants incurred if that safe place were one under their own charge and control, it assuredly is not the responsibility of a common carrier."

There is a little missing, eighteen bundles. The original bill of lading is for 2000 bundles of hoop iron, and the advice notes notify a reception of 2000 bundles. It appears that the defendants' officers did not take the trouble to check the number of bundles that arrived at London. All that they could say was that if the 2000 arrived in London they were delivered, or rather deposited in the place indicated, and that they must have been stolen from there.

However, that is mere conjecture. *Primâ facie* they received the 2000 bundles to forward, and it lies upon them to shew that they brought them to London, and that they were delivered out of the cars. If the officers of the company will not take the trouble to check and see what goods they discharge from their cars, if it turns out there is a discrepancy between their way bills and the articles delivered, and that a quantity is missing, and it is not accounted for, the presumption is that the goods were lost while in their custody as common carriers, and they are liable to the consignees for the value. They cannot relieve themselves from responsibility by saying all that arrived was delivered, and they must go further and shew what they did deliver.

The rule will go to reduce the verdict to \$44.03.

Rule accordingly.

MCNAB V. TAYLOR.

Injunction.

The defendant, though forbidden by the plaintiff, went on with the erection of a dam which he had commenced before the plaintiff purchased the adjoining land, and when completed it backed the water on to the plaintiff's land and injured a timber slide which he had there, for which the plaintiff brought an action and recovered \$60. The Court granted an injunction to restrain the defendant from continuing the dam so as to pen back the water.

THE first count of the declaration in this case was for injury to a timber slide of the plaintiff by backing water on it by the erection of a dam by the defendant.

The case was tried at the Fall Assizes at Perth, in 1871, before Hughes, Co. J., sitting for Richards, C. J., when the jury rendered a verdict of \$60 for the plaintiff on the first count.

In Hilary Term, 1872, *Osler* obtained a rule *nisi* calling on the defendant to shew cause why a writ of injunction should not issue herein, to restrain him from the wrongful acts complained of in the first count of the declaration, and from committing any injury of the like kind relating to the property and rights of the plaintiff mentioned in the said count, and from erecting, keeping erected, and continuing the erection of so much of the dam and obstruction in the said count mentioned, in such manner as to pen and force back the waters of the stream therein mentioned, against and upon the timber slides and land of the plaintiff, and from erecting any other dam or doing any other act whereby the waters of the said stream might be penned or forced back, &c., and from the continuance of any acts of a like nature; upon grounds disclosed in affidavits and papers filed.

The facts set out in the affidavits, which were contradictory, sufficiently appear in the judgment for the purposes of this report.

During Michaelmas term, 1873, *J. K. Kerr* shewed cause. The *locus in quo* is a gully 80 feet deep, with steep sides, down the bottom of which a stream about four feet

deep flows, coming from White Lake. Across this gully the defendant has erected a dam and a mill at considerable expense, which the plaintiff now seeks to have removed. Above the site of this mill the plaintiff has a slide, erected in 1839 and continued since, down which lumbermen send their logs. The lower part of the slide is loose, and it is alleged that the water raised by the dam when suddenly let out by accident or otherwise allows the slide to fall on the rocks beneath, and he also alleges that his lands have been flooded. For the damage to the land the defendant paid into Court \$5, and the jury assessed the damage at \$2. The injury to the slide was found to be \$60. Our affidavits shew there has been no injury since. The matter is of such a trifling nature that the plaintiff should be left to another action. The remedy is an extraordinary one, and should be granted cautiously. The dam has been built in a permanent manner and is beneficial to both parties, and could not be removed without great damage to the defendant. He referred to *Winstanley v. Lee*, 2 Swans. 333, 336; *Angell on Water Courses*, 6th ed., sec. 444; *Sutton v. The South Eastern R. W. Co.*, L. R. 1 Ex. 32, 39; *Mines Royal Societies v. Magnay*, 10 Ex. 489; *Attorney General v. Sheffield Gas Consumers' Company*, 3 De. G. McN. & G. 304, 22 L. J. Ch. 811.

Osler supported his rule. The plaintiff's right to have this nuisance abated was established by the verdict of \$60. The Court now will grant an injunction to restrain an infringement or threatened infringement of a right, even where the damage is slight; but our affidavits shew more than a slight injury. The defendant built his dam with full notice that we objected to it, and if he is injured by the removal of the mill, he is wholly to blame. The case might have been different if we had either authorized the building of the mill and dam, or tacitly permitted it, but we are not in that position. He cited *Jessel v. Chaplin*, 2 Jur. N. S. 911, 4 W. R. 610; *Carnes v. Nesbitt*, 30 L. J. N. S. Ex. 348. *Huntingdon v. Lutz*, 13 C. P. 168; *Harrison's C. L. P. Act*, 2nd ed., 469.

RICHARDS, C. J., delivered the judgment of the Court.

As we understand the facts of this case, the plaintiff became the purchaser of the land which was flooded by defendant's dam in the spring of 1869, when he went to reside there. Shortly before the plaintiff went there defendant had probably commenced making a dam, but no water had been raised on the plaintiff's land, and the plaintiff then forbid him from backing water on the slide that was there, or injuring his chutes. Some months after the defendant completed his dam, and put up a small saw mill. In the spring of 1870, the dam was carried away, and the plaintiff brought his action on the 15th July, 1871.

He declared in the first count for injury to a slide which was on his land, and recovered \$60 damages for that.

The second count was for overflowing the land, and the defendant paid into Court \$5 in full satisfaction of those damages, and the jury found this sufficient.

On this present application for an injunction affidavits were filed, which were contradictory as to whether the keeping up of the dam was injurious or likely to prove injurious to the plaintiff's slide.

There is no denial or attempt to deny that the keeping up of the dam overflows the plaintiff's lands, and on the trial it was shewn by the evidence of the surveyor called by the plaintiff that it overflowed the plaintiff's land so as to injure, if not destroy, a mill site which was upon it.

Of course, if the plaintiff saw the defendant build a mill and dam which would overflow his land, and did not object to it, and permitted him to do so, a Court of Equity might in its discretion refuse a mandatory injunction to compel the party after incurring great expense to remove his dam. But when a party against the remonstrance of the adjoining owner will persist in building a dam when forbidden to do so, and overflows the land of the adjoining owner, the authorities seem to us to go the length of holding it to be the duty of the Court to compel the removal of the obstruction to the natural flow of the water.

Formerly, when the damages were small and the injury

to the defendant would be very great, the Court would leave a party to his remedy at law ; but the recent cases go much further, and the injunction will be granted at the instance of a riparian proprietor when the interference with the running stream is of such a character that it may ripen into a right prejudicial to the owner of the land adjoining. *Beckett v. Morris*, L. R. 1 Sc. App. 47, is a late case in the House of Lords on the subject.

Many of the modern authorities are collected in *Beamish v. Barnett*, 16 Grant 318, decided in our own Court of Appeals.

If the defendant had put up his dam and built his mill with the consent of the prior owners of the land, and had not been interfered with for many years, a Court of Equity might refuse an injunction to a purchaser who had bought with a knowledge of the acquiescence of the owner.

But here it is not pretended there was any consent or acquiescence, or any knowledge of what defendant had done or was doing, by the former owners, and the plaintiff as soon as he purchased forbid the defendant from going on with his dam, and offered to sell him a water power ; nevertheless the defendant chose to go on and spend his money. The plaintiff is not responsible for that, and it seems to us, on the general doctrine as now held in the Courts of Equity, this injunction must go.

In *Attorney General v. Sheffield Gas Consumers Co.*, 3 DeG. M. & G. 328, Knight Bruce, L. J., said, in effect, when the expenditure takes place under full notice that it was objected to, it is no ground to oppose an injunction.

In *Barkart v. Houghton*, 32 L. T. 382, it is stated, in effect, that "though A. may be disintitiled by acquiescence to an injunction to stop B's manufactory which is noxious to the neighbourhood, yet it does not consequently follow that B. is entitled to an injunction to prevent A's recovering damages at law, and equity may leave both parties to their legal rights.

Many of the cases are referred to in *Joyce on Injunctions*, 111, 112.

Rule absolute.

CHURCHER V. JOHNSTON.

Insolvent Act of 1869, sec. 90—Payment within thirty days—Action by assignee to recover back—Valuable security given up—Advance on credit.

Action by the assignee of B. & P., insolvents, to recover back \$190 paid by them to defendant within thirty days next before the assignment, they being then unable to meet their engagements in full, and defendants knowing such inability or having probable cause for believing it to exist.

Plea, on equitable grounds, that before the alleged payment B. & P., being retail merchants, requested the defendant to lend to them for the purpose of carrying on their business, and he did lend, from time to time, various sums of money, upon the express agreement that such moneys should be repaid to defendant out of the proceeds of the daily sales of goods thereafter made by B. & P., and that such proceeds should be held by B. & P. upon trust to repay and should be charged with and applied in repaying the defendant the amount lent by him; and at the time of the payments in the declaration mentioned, the defendant was the creditor of B. & P. to an amount not less than such payments for moneys advanced upon the said express agreement, and the moneys paid to defendant by B. & P. were paid out of and formed part of the proceeds of said daily sales, and were paid by B. & P. and applied by defendant upon and on account of the moneys advanced by defendant upon the said agreement, and not otherwise.

Held, on demurrer, Morrison, J., dissenting, reversing the judgment of the County Court, plea good; for that the agreement between B. & P. and defendant, gave defendant an equitable claim and mortgage on their goods which, under the proviso to sec. 90 of the Insolvent Act of 1869, was a "valuable security given up in consideration of such payment," and which must be restored to defendant before a return of the payment to him could be demanded.

Morrison, J., was of opinion that the "valuable security," mentioned in sec. 90, must be a security recognized in law, which would prevail in the hands of a holder against any creditor, which the creditor when proving could shew and describe and value, and capable when so valued of being assigned and delivered to the assignee for the benefit of the estate; and that the equitable claim of defendant here was not such a security.

APPEAL from the County Court of Middlesex.

Demurrer. Declaration. First count: that one A. W. Brown, and W. A. Perkins, carrying on business in the village of Strathroy as retail merchants, under the name and style of Brown and Perkins, being unable to meet their engagements in full, made certain payments to the amount of \$190.28 to the defendant, who was then a creditor of such firm, and who knew at the time of such payments of such inability to meet their engagements, and within thirty days after the making of such payments

the said B. & P. executed a deed of assignment, under the Insolvent Act of 1869, of their estate and effects to a duly appointed official assignee in and for said county, and the plaintiff has since been appointed assignee of such estate and effects under said Act, and seeks the recovery of the moneys so paid as such.

Second count: that the said B. & P. being traders within the meaning of the Insolvent Act of 1869, and being unable to meet their engagements in full, made certain payments, amounting in all to the sum of \$190.28, to the defendant, who was then their creditor, and who at the time of such payment had probable cause for believing that they were so unable to meet their engagements in full; and the said B. & P. afterwards, and within thirty days next after the making of the said payments and all of them, executed a deed of assignment, under the Insolvent Act of 1869, to a duly appointed official assignee in and for said county, and the plaintiff has since been duly appointed assignee of their estate and effects under the said Act, and seeks the recovery of the money so paid as such.

Third plea, on equitable grounds, to the whole declaration: that before the said B. & P. made the said assignment, and before the payment of the money in the declaration mentioned, the defendant at the request of the said B. & P., then being retail merchants, and for the purpose of enabling them to carry on their said business, lent and advanced to the said B. & P. from time to time, and at various and frequent times, various moneys and sums, upon the express agreement between defendant and said B. & P. that such moneys should be repaid to the defendant out of the proceeds of daily sales of goods thereafter made and effected by the said B. & P. in the said business, and that the proceeds of such daily sales should be held by the said B. & P. upon trust to repay, and should be charged with and applied in repaying, to the defendant the amount so lent and advanced by him to the said B. & P. And at the time of the payments in the declaration mentioned the

defendant was the creditor of the said B. & P., to an amount not less than the moneys in the declaration mentioned, for moneys so lent and advanced by him from time to time to the said B. & P. upon the said express agreement; and the moneys in the said declaration mentioned as paid by the said B. & P. to the defendant, were paid by them to him out of and formed part of such moneys arising from and being proceeds of the daily sales of goods made and effected by the said B. & P. in their said business, after the said sum had been lent and advanced by the defendant to the said B. & P. upon the said agreement, and were paid by the said B. & P., and were applied by the defendant upon and on account of the said moneys so lent and advanced by the defendant to the said B. & P. upon the said agreement, and not otherwise.

The plaintiff demurred to this plea, on the grounds:

1. That it admits the knowledge by defendant of the inability of B. & P. to meet their engagements, and the payment by B. & P. to the defendant of the moneys mentioned in the declaration while defendant had such knowledge.

2. That it confesses the causes of action in the declaration and does not set up any sufficient grounds for the avoidance of the same.

3. That it does not disclose any defence of an equitable character, as it does not set up that there was an equitable or other assignment of any particular fund by B. & P. to the defendant.

4. That it does not set up that said payments were not made by B. & P. to the defendant out the general funds of B. & P. as merchants and traders.

5. That it attempts to set up a defence to this action which would have the effect of defeating the object of the Insolvent Act of 1869, providing for the equal distribution of the estate of insolvent debtors. Joinder.

In July Term, 1873, the demurrer was argued in the Court below, before Elliott, Co. Judge, who gave judgment in favor of the plaintiff in the same term, as follows:

ELLIOTT, Co. Judge.—[After stating the pleadings.] By sec. 90 of the Insolvent Act of 1869, it is enacted that every payment within thirty days next before the execution of a deed of assignment by a debtor unable to meet his obligations in full to a person knowing such inability, or having probable cause for believing the same to exist, is void, and the amount paid may be recovered back, &c.

Now by this plea it is admitted that within thirty days of the assignment the insolvents paid this money to the defendant, who then knew of their inability to meet their engagements in full, or, in other words, who then knew of their insolvent condition. Here then we have all the circumstances in existence which are requisite to entitle the plaintiff to recover this money back under the 90th section, unless the other facts which the defendant sets forth in the plea are such as to take his case out of this section.

The general course of our legislation has been to require that notice should be given when a party in the visible possession of goods is not the owner thereof, the chief object being to prevent persons from obtaining credit by false appearances. The Insolvent Act is designed to effect a fair and equal distribution of the insolvent's effects among his creditors, and to my mind a strong and satisfactory authority ought to be given to establish that a party like this defendant can through that act reap advantage which without it he would not be entitled to. I make these remarks because it is contended that the effect of the arrangement described in the third plea was to give the defendant an equitable claim to the goods of the insolvent.

This term equitable claim, and the similar terms equitable assignment, equitable mortgage, equitable lien, and so on, are often very vague. They seem to me to be very often used to designate some claim, real or imaginary, which the party using the expression finds it not so easy more distinctly to define.

If the defendant desired to have security upon the stock in trade of the insolvents, the ordinary way of proceeding would be to register a chattel mortgage or bill of sale.

In the absence of such a precaution he would find his claim to have a charge upon that stock of very little service against an execution creditor. But in the case before us the defendant considers he is entitled to a preference as an equitable mortgagee or claimant, because it has been decided, as in *Mogg et al. v. Baker*, 3 M. & W. 195, that the assignee of a bankrupt can only take such property as he, the bankrupt, was equitably as well as legally entitled to at the time of the bankruptcy. It was argued that the defendant took an equitable assignment or mortgage on the goods of the bankrupt.

Now in the case of *Mogg et al. v. Baker*, 3 M. & W. 195, the question arose whether certain goods went to the assignee, or to the defendant, who claimed them or the proceeds under an agreement by the insolvent to give a bill of sale upon them for the price which he, the defendant, had furnished.

The matter having been referred to a legal arbitrator, Parke, B., said, at p. 198: "The arbitrator will take the law to be that which the Court lays down—that, if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent its passing to the assignees of the insolvent, but, if it was only an agreement to mortgage furniture to be subsequently acquired—to give a bill of sale at a future day of the furniture and of the goods of the insolvent—then it would cover no specific furniture, and would confer no right in equity."

Now apply this case to the defendant's contention, that he had an equitable charge upon the goods of the insolvent. The first question is, upon what goods.

The plea states that the defendant was to be repaid out of the proceeds of the daily sales of the goods thereafter made and effected by the said Brown & Perkins, not the proceeds arising from the sale of any particular goods, but of all goods sold by Brown & Perkins, so that the equitable charge contended for would or might include the proceeds of goods which were received into the store at future periods, and from various parties. Surely the requisites

pointed out by Parke, B., to constitute an equitable assignment or charge are wanting here.

In all the cases I have been referred to relating to equitable claims of creditors prevailing against the assignee in insolvency, I find no authority sustaining the defendant's position. There are many cases where equitable claims have been allowed against the assignee, but I think they are all distinguishable from this case.

Thus, in *Toovey v. Milne*, 2 B. & Al. 683, the sum of £120 had been advanced to the bankrupt before bankruptcy for the purpose of settling with his creditors, but no settlement having been made, the bankrupt returned part of the money. Abbott, C. J., held, that as the money was advanced for a special purpose, and was therefore clothed with a specific trust, the assignee of the bankrupt had no right to it, and the repayment of it, on the failure of the purpose for which it was advanced, was protected as against the assignee.

So in *Edwards v. Glyn*, 2 E. & E. 29, although the most material point was whether a payment by the bankrupt was voluntary or not, still Erle and Crompton, JJ., held, that the money which was advanced to prevent a run upon the insolvents, who were bankers, and which having been found insufficient was returned to the defendant, not having been used for the contemplated purpose, could be retained by the defendant against the assignee; Crompton, J., saying in substance, "The purpose for which the money was advanced having failed, you are bound to return the money."

These two cases are thus summarized by Mr. Addison, in his *Treatise on Contracts*, 6th ed., p. 827, "If therefore, money has been advanced to a bankrupt to be applied to a special purpose, and to be returned if the purpose cannot be accomplished, that money does not vest in the assignees, if it has been kept separate and apart from the moneys of the bankrupt, and has not been used by him so as to make him a borrower of the money for his own use."

But the defendant in the case before us lent and advanced

the money, we are told in the plea, to the insolvents at various times, to enable them to carry on their business, not to do a particular specified act, but to use the money in their business, and not to be returned to the defendant on the non-accomplishment of any particular specified act, or on failure thereof, but to be repaid out of the proceeds of the daily sales.

In *Hunt v. Mortimer*, 10 B. & C. 44, the assignee sought to recover back money advanced by the defendant to enable the bankrupt to execute a particular order given by the East India Company, lent upon the express agreement that the defendant should receive the proceeds of the order from the East India Company, and repay himself. Having done so it was held that the assignee of the bankrupt could not recover from the defendant.

This case and others to which I have been referred turned chiefly on the question of fraudulent preference, but it has some bearing on this case. Thus Littledale, J., said, at p. 46, "All the creditors who have trusted to the general credit of the bankrupt should share his property equally," and Parke, B., said, "The money was not lent by the defendant on the general credit of the bankrupt, but on the faith of the moneys which were to be received from the East India Company, and the arrangement between the defendant and the bankrupt had the effect of an equitable assignment of that particular fund."

But in the case before us there was no specified fund of the description here, and in all the other cases I have been referred to mentioned nothing but the daily proceeds of the sales made by the insolvents. I think he thus trusted to the general credit, inasmuch as he trusted to the only fund from which the creditors generally could be paid.

It was urged on behalf of the defendant upon the argument that he sought to recover nothing but what he himself had paid in order to enable the bankrupts to continue their business, and that therefore the creditors could lose nothing by the defendant's recovery, as the insolvent and creditors had had the benefit of the advances. But it is very

doubtful that the prolongation of the business was beneficial to the creditors; for all that appears in the plea the defendant, when advancing the money from time to time, may have been aware of the insolvent condition of the bankrupts; thus the advances may have had the effect of mischievously prolonging their business operations by enabling them to procure fresh supplies of goods from persons ignorant of the fact that the proceeds of the daily sales were absorbed to meet the defendant's demands.

I need not refer to all the cases cited. I have examined all of them, and I may add that I do not find any authority which I deem sufficient to warrant me in concluding that there is any thing sufficient in this plea to entitle the defendant to be excepted from the provisions of the 90th section.

From this judgment the defendant appealed, on the grounds: 1. That the payments set out in the defendant's third plea were not such payments as are referred to and meant in sec. 90 of the Insolvency Act of 1869, which makes void only payments to general creditors out of the general funds of the insolvent, and not the repayment of moneys which had been advanced to the insolvent upon a specific trust, and agreed to be repaid out of a particular fund which is charged with or appropriated for their repayment.

2. That the said plea shews that the payments therein mentioned were made, not out of the general moneys and effects of the insolvents, but out of a particular fund which the assignee was not entitled to, but only to the surplus thereof after the satisfaction of the trust with which the said trust was charged.

3. That the payments made by the insolvents were payments not out of moneys belonging to the insolvent, but out of moneys belonging to the defendant.

4. That the said plea sets forth a valuable security held by the defendant for the moneys advanced to the insolvents, and that under the said sec. 90, said plea is

good, the onus being upon the plaintiff to shew that such security was given up.

In Michaelmas Term last the appeal was argued.

A. F. Campbell, for the defendant, the appellant. The property of an insolvent which passes to his assignee is such property only as the individual is both legally and equitably entitled to. The defendant lent his money upon condition only that he should be repaid out of the daily sales of the goods, and he would not have lent it but for the special agreement which was made for its repayment. That agreement was a valid one; it gave the defendant an equitable claim or mortgage upon the goods from which the repayments were to be made, and on the moneys the proceeds of the goods. The defendant too has not got back more than the amount of his special advances, he has been repaid only what was his own money. The following references fully sustain the sufficiency of the plea, besides those which were cited in the Court below: Insolvent Act of 1869, sec. 90; *Toovey v. Milne*, 2 B. & Al. 683; *Leslie v. Guthrie*, 1 Bing. N. C. 697; *Langton v. Horton*, 1 Hare 549; *Arch. Bankruptcy*, ed. of 1869, 380; *Langton v. Waring*, 18 C. B. N. S. 315; *Mathers v. Lynch*, 27 U. C. R. 244. The defendant was at any rate entitled to retain the money paid to him until his security had been given up, namely, the goods or his claim or lien upon the goods of the insolvents, which were a fund to him for the repayment of the advances he had made: *Hutton v. Crittwell*, 17 Jur. 392. But the contention of the plaintiff was that he was entitled to both the money and the goods.

H. McMahon, contra. The reasons given in the judgment of the Court below are satisfactory, and the authorities upon which the judgment was formed fully sustain it. If such a plea as this is to be held to be a good defence in such a case, it would be opening the door to every species of fraud. It would defeat the whole object of the statute, and it would be giving greater effect to a mere parol bar-

gain than is given to a chattel mortgage, or formal bill of sale. It is impossible to consider this parol bargain as constituting a fund for the repayment of the money, for there was no specific fund or property upon which a trust could arise or be attached. See *Edwards v. Glyn*, 2 E. & E. 29; *Hunt v. Mortimer*, 10 B. & C. 44; *Holroyd v. Marshall*, 9 Jur. N. S. 213; *Mogg et al. v. Baker*, 3 M. & W. 195; *Mathers v. Lynch*, 27 U. C. R. 244; *Churcher v. Cousins*, 28 U. C. R. 540; *Churcher v. Stanley*, decided by Mowat, V. C., not reported; *Payne v. Wenby*, 20 Grant 142; *McFarlane v. McDonald*, 21 Grant 319; *Nunes v. Carter*, L. R. 1 P. C. 342; *Adams v. McCall*, 25 U. C. R. 219; *Newton v. The Ontario Bank*, 13 Grant 652; S. C. in appeal, 15 Grant 283; *Belding v. Read*, 3 H. & C. 955.

WILSON, J.—The learned County Judge, in a very able and carefully considered judgment, in the course of which he cited several adjudged cases, was of opinion the payments in question were recoverable by the assignee by sec. 90 of the Insolvent Act of 1869.

The facts stated in the pleadings for our opinion are : that Brown & Perkins were traders, and were unable to meet their engagements in full : that they being so unable made payments to the amount of \$190.28 to the defendant : that the defendant was then a creditor of theirs : that he knew at the time the payments were made of the inability of Brown & Perkins to meet their engagements : that Brown & Perkins, within thirty days after making the payments, executed an assignment under the Insolvent Act of 1869, and that the plaintiff is the assignee : that before these payments were made, Brown & Perkins had requested the defendant to lend them money from time to time to enable them to carry on their business : that the money was to be lent on the express agreement that it should be repaid from the daily sales of their goods : that the proceeds of the sales were to be held by Brown & Perkins in trust for the defendant : that at the time of the re-payments, there was

as large a sum as these moneys came to then owing by Brown & Perkins, on account of the loan which had been made to them ; and that the money paid to the defendant was procured from the sales of these goods.

It is admitted at present that the defendant knew at the time the payments were made to him that Brown & Perkins were unable to meet their engagements ; and that within thirty days after making such payments, they became insolvents under the statute.

The plaintiff says such payments were not protected against the general body of creditors. The defendant contends they were.

The words of the 90th section of the statute are : " Every payment made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under this Act, by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, is void, and the amount paid may be recovered back by suit in any competent court, for the benefit of the estate ; provided always that, if any valuable security be given up in consideration of such payment, such security or the value thereof shall be restored to the creditor before the return of such payment can be demanded."

The enactment anterior to the proviso is unqualified in form, and invalidates every payment made, without any exception, where the creditor had knowledge or had reason to believe the debtor was unable to meet his engagements.

It is not like the 92nd section of the English Bankruptcy Act of 1869, which avoided " every payment made * * by any person unable to pay his debts as they become due," but with the qualifying words, " with a view of giving such creditor a preference over the other creditors." *Ex parte Blackburn, Re Cheeseborough*, L. R. 12 Eq., 358.

It is similar to the Jamaica enactment referred to in *Nunes v. Carter*, L. R. 1 P. C. 342, and to the provision mentioned in *Becke v. Smith*, 2 M. & W. 196, which were held to avoid sales of property which were made within a cer-

tain time before bankruptcy or insolvency, although free from fraud.

And it is similar to the earlier bankruptcy enactments, which expressly over-reached the transactions of traders which were made within the prohibited period, without regard to the innocence of the parties concerned, because the public interest was supposed to be served by their avoidance.

Upon the first part of the 90th section, there is no way of supporting the payments which were made to the defendant; the enactment is too absolute. They are simply void.

Does the proviso at the end of the section help the defendant in any way?

Had the defendant any valuable security for the money he had lent; and if he had, did he give it up in consideration of such payment?

What he had, was the agreement of Brown & Perkins, founded on the consideration of the loan, that he should be repaid out of the proceeds of the daily sales of their goods; and that the proceeds of the sales should be held by Brown & Perkins in trust for that purpose. All that was, we may assume, a bargain by mere parol, without deed or writing.

Did that bargain give the defendant a valuable security upon the goods, or upon the proceeds of the goods in question?

The goods were the goods in the business of Brown & Perkins, as retail merchants, at the Village of Strathroy. That means, as I understand it, goods in their place of business as retail merchants at Strathroy.

That is a specific description of the goods, and a description of the specific goods which were referred to: *Mathers v. Lynch*, 28 U. C. R. 354; S. C. 27 U. C. R. 244; *Langton v. Waring*, 18 C. B. N. S. 315; *Bittlestone v. Cooke*, 6 E. & B. 297; *Hutton v. Cruttwell*, 1 E. & B. 15; *Hope v. Hayley*, 5 E. & B. 830.

I do not see anything in the pleadings which shews that a claim was made by the defendant on after-acquired goods;

but if he did, and if that were the agreement, the defendant would, if he had a valid claim upon the goods in the shop at the time of the agreement, have a right also when new goods came into the shop to have his claim established against and in respect of them.

I understand it to be decided in *Holroyd v. Marshall*, 9 Jur. N. S. 213, that whenever specific performance of a contract relating to goods would be decreed,—and it will be decreed whenever the goods are specifically known and designated,—the Court will consider a contract made with respect to them before they have been acquired to be complete in equity whenever they have been acquired and answer the description of those in the contract.

In *Hope v. Hayley*, 5 E. & B. 830, Crompton, J., said, at p. 848, “I should hold that the after acquired goods were made subject to the trusts, and that it would not have been competent to R. (the mortgagor), to say that the trusts should not be executed.”

This case is relieved from the difficulty raised in some of the cases, as to after-acquired property—in which a license is given to the grantee to seize it, and seizure is required to perfect his legal title; and in which the grantee has a conveyance of them, but that conveyance must be perfected by the subsequent appropriation of the grantor to the purposes of the grant: *Hope v. Hayley*, 5 E. & B. 830; *Belding v. Read*, 3 H. & C. 955;—because in this case, if the defendant were paid in whole, or in part, from the after-acquired property, the grantors, Brown & Perkins, must of necessity have first appropriated them to the purposes of the contract with the defendant by selling them for his benefit and giving to him their proceeds.

No question then arising between goods existing and those not existing at the time of the contract, we have then to enquire whether the verbal contract relied on was a contract which was good in equity.

If the agreement had been by bill of sale, duly filed according to the statute, it would, if made for the purpose of enabling the debtors to carry on their business, have been a valid security.

Many of the cases referred to, shew it would have been so. I refer also to *Lomax v. Buxton*, L. R. 6 C. P. 107; *Mercer v. Peterson*, L. R. 2 Ex. 305 affirmed in Ex. Ch., L. R. 3 Ex. 104; *Hope v. Hayley*, 5 E. & B. 830.

If it had been in writing only and not by deed, it would not have been valid as against creditors, but it would have been a binding contract between the parties. Is it not equally binding between them, although resting in parol only?

It is laid down as a settled rule in equity that a declaration of trust may be made by parol only, with respect to personal property, and a written instrument is not necessary for the purpose: *Nab v. Nab*, 10 Mod. 404; *Bayley v. Boulcott*, 4 Russ. 345; *McFadden v. Jenkyns*, 1 Hare 458; and in Appeal before the Lord Chancellor, 1 Phil. 153; *Collinson v. Patrick*, 2 Keene 123; *Benbow v. Townsend*, 1 M. & K. 506; *Peckham v. Taylor*, 31 Beav. 250; *Jones v. Lock*, L. R. 1 Ch. App. 25.

In *McFadden v. Jenkyns*, 1 Hare 458, the facts were; Thomas Warry lent £500 to the defendant. Soon after he sent a verbal message to defendant by one Bartholomew, desiring the defendant no longer to consider the money as due to him, but to hold it "upon trust for the plaintiff, to be at her absolute disposal for her own use and benefit." Bartholomew delivered the message to defendant, who accepted the trust, and afterwards, and in the lifetime of Thomas Warry and with his knowledge, paid to the plaintiff £10 in part execution of the trust. And it was held there was a trust upon the money which was complete and irrevocable.

Now, if in such a case, and in favour of a mere volunteer, this was decided to be a trust, and irrevocable by the grantor, how much more must this trust in favor of the defendant by special bargain, and for a valuable consideration, be held to have been available and irrevocable in his favour.

The defendant had an equitable claim and mortgage on these goods, which were specifically designated and ascertainable, and he had the right to require his debtors to

make his title perfect to him in law if it had been necessary for him to do so.

But it was not. The debtors faithfully kept their engagement, and both sides were satisfied; and now that it has been fulfilled the plaintiff desires to undo it all, and to take both the goods of the debtors and the money of the defendant.

It would be unfair if he could do so, and in my opinion the defendant has, in the language of the proviso of the 90th section of the statute, by giving up his equitable claim upon the goods of the debtor, in effect, "given up a valuable security in consideration of such payment," and therefore "such security or the value thereof, shall be restored to the creditor before the return of such payment can be demanded;" and as that has not been done, there must in my opinion be judgment on demurrer for the defendant.

The case of *Ramsden v. Lupton*, L. R. 9 Q. B., 17 Ex. Ch., has a good deal of application to this case.

The order therefore will be that the appeal be allowed, and that the order declare that the rule for judgment on demurrer for the plaintiff in the Court below be set aside, and a rule be drawn up that judgment be entered on the demurrer for the defendant.

RICHARDS, C. J., concurred.

MORRISON, J.—The learned Chief Justice and my brother Wilson have arrived at a conclusion in this case that I cannot concur in, for I am of opinion that the words "valuable security" in sec. 90, followed by the words "be given up," is used in a restricted sense; that what the Legislature meant and had reference to was a security such as is mentioned in the preceding sec. 60, a security recognized in law, and which would prevail in the hands of the holder against any creditor of the insolvent, a security which the creditor when proving his debt could shew and describe and state its money value, and when so valued capable of being assigned and delivered to the assignee for the benefit of the estate under the statute.

I cannot see that this defendant held or gave up any such security.

I do not think that the framers of the Insolvent Act contemplated, by the proviso to the 90th section, the protection of a payment made under color of such an agreement.

In my judgment so to construe the proviso would give it an effect contrary to the spirit and intent of the statute.

The intention of the Legislature was to prevent an insolvent trader making preferential payments; and, considering that traders who become insolvent generally pass gradually into that state, with a view of insuring an equal division of the assets, it was deemed necessary to limit a period after which payments made by such a trader would be void *per se*, and without investigation. That limit is thirty days before the deed of assignment, with this exception, that of a payment made in consideration of which a valuable security was given up.

If the words of the proviso are capable of a construction in furtherance of and consistent with the well known policy and object of the Insolvent laws, we ought to adopt that construction, rather than give to it an effect which will authorize the mischief the section was intended to provide against.

The proviso expressly points to the giving up of a valuable security as a consideration for such excepted payment. Can it be said, in the ordinary meaning of these words, that any thing was given up here? I think not. All that is done is the making the payments according to the stipulation made between the trader and the creditor, the agreement being to repay the money advanced out of the trader's daily sales of his business.

Such a stipulation, it may be said, is impliedly made by every retail trader to his wholesale creditor, when he obtains goods on credit to carry on his business; and it seems to me, if we determine that such an understanding will protect payments of an insolvent trader up to the date of the deed of assignment, every merchant when advancing goods or moneys to his customers, particularly if he has reason to

doubt his solvency, before furnishing goods, in order to protect himself against the effect of the 90th section, will only make such advance upon an undertaking by the trader that he will repay such advances out of his daily or weekly sales, as they may agree, and so clothe all his goods *in esse* and *in futuro* with various trusts.

Again, assuming that this parol agreement enures as a valuable security within the proviso of the 90th section, I am at a loss to see in what way could such an alleged security be restored to the creditor before the assignee could demand a return of such a payment, or the value thereof be determined.

There are various other grounds upon which I think this appeal should be dismissed, but as my opinion can not affect the judgment of the Court, which in this case is final, it is unnecessary for me to discuss more fully the case.

I think the appeal should be dismissed.

Appeal allowed.

SCALES ET AL. V. IRWIN.

Public company—Payment of stock—Action by creditor against shareholder.

The plaintiff, a creditor of a company incorporated by letters patent sued defendant, a shareholder, who pleaded that there was nothing due upon his stock. It appeared that there were nine shareholders, two of whom held a patent right under which the company were to work. The defendant held \$5000 stock, on which he had paid in cash \$1000. It was arranged between the patentees and the other shareholders, that the latter should pay an additional 10 per cent. on their stock, making 20 per cent., in consideration of which the patentees, who were said to have a large cash claim against the company for their patent right, were to pay up the balance of the unpaid stock of the seven shareholders, equal to \$28,000, out of this claim. In pursuance of this arrangement, each of the seven gave his check to the secretary for the balance of his unpaid stock, which the secretary passed on to the patentees, who accepted them and gave receipts to the company for the amount. The patentees then handed back the checks and receipts to the secretary, who returned the checks to the shareholders by whom they were given; it having been agreed beforehand that they were to be so returned, and not used. *Held*, that this transaction was not a payment in full of the stock, and that defendant was liable.

THE plaintiffs, as creditors of "The Ontario Wood Pavement Company," sued the defendant as a shareholder of the Company, for the amount of their demand, being less than the unpaid stock of the defendant in the Company.

The defendant pleaded—1. That he was not a stockholder. 2. That there was nothing due and unpaid by him on the stock of the Company; and, 3. That the execution was not returned unsatisfied against the Company. Issue.

The cause was tried before Wilson, J., at the Winter Assizes, at Toronto, in January, 1874, without a jury.

From the evidence, it appeared the capital stock of the Company was stated in the letters patent to be \$130,000, the subscribed capital \$70,000, and the sum of \$7,000, or 10 per cent. of the subscribed capital, to have been paid up.

The following is a copy of the share list of the Company:—"We, the undersigned, hereby subscribe for the number of shares set opposite our respective names, in the capital stock of the Ontario Wood Pavement Company of Toronto, and agree to pay forthwith to James Austin and Frank Smith of Toronto, as trustees for the said Company,

a sum not exceeding twenty per cent. of the amount subscribed by us respectively, and to be subject in all things to the requirements of the charter of said Company when issued : [Signed.]

James David Edgar, Barrister, 17th Dec., 1870, 50 shares.....	\$5,000
John Lamb, Manager, Cramp, Torrance & Co., 17th Dec., 1870, 50 shares.....	5,000
George Allan Arthurs, Merchant, 19th Dec., 1870, 50 shares	5,000
John Day Irwin, Express Agt., 19th Dec., 1870, 50 shares.....	5,000
David Galbraith, Toronto, 22nd Dec., '70, 50 shares.	5,000
J. Saurin McMurray, Barrister, 22nd Dec., 1870, 50 shares.....	5,000
H. L. Hime, Estate Agt., 18th Jan., 1871, 50 shares...	5,000
Wm. Wallace Perkins, Counsellor-at-law, on the 27th Jan., 1871, 180 shares.....	18,000
F. R. Fisher, Publisher, 27th Jan. '71, 170 shares...	17,000

Mr. *Hime* was called by the plaintiff. His examination in chief was not material. His cross-examination was as follows :—I was a stockholder, and at one time secretary of the Company. The defendant's stock was paid ; there was a payment made down in cash by him of \$1,000. To the patentees, Perkins & Fisher, was to be given a certain amount of stock treated as paid up, and a certain amount in cash for their patent right. I do not know how much stock they got. The patent right cost the Company a large sum. There was a difficulty found in getting a sufficiency of working capital to carry on the affairs of the Company ; and there was an arrangement made between the patentees and the Company, that if the Company raised sufficient cash to carry on the work of the Company, the patentees would pay up the balance of the unpaid stock out of the cash that was to be paid to them for their patent right. I think \$10,000 or more was raised by the Company under that arrangement ; that was beyond what had been

before paid in on the stock. The patentees of the right were to pay up the balance of the unpaid stock of the Company subscribed out of the money they were to get from the Company for their patent right, on the Company raising the necessary cash to carry on the Company. The patentees, under that arrangement, paid up the unpaid stock of the Company. The money raised was expended in buying plant and in carrying on the contract with the city. There was, I believe, \$10,000 paid in on the stock, and the \$10,000 was raised by the Company. That was an arrangement made about three years ago, about the time the charter was obtained. The Company were not successful in their operations. The Company stopped about two years ago. * * The subscribed stock was about \$50,000. Whatever it was it was paid up.

Re-examined. I can't say how much the patentees of the right had for stock. The \$50,000 was subscribed stock besides that held by the patentees. The arrangement was made at the Rossin House * * some time in or about the summer of 1871.

The witness here described the transaction at the Rossin House, substantially as follows :—

he seven shareholders, that is, all the members of the Company but the two holders of the wooden pavement patent right, were to pay in an additional ten per cent. upon their stock, which would be equal to \$3,500; and in consideration of that being done, the patentees of the right, who it was said had a large cash claim against the Company for the price of the right which they had sold to the Company, over and above their paid up stock of \$35,000, were to pay up the balance of the unpaid stock of the seven shareholders, equal to \$28,000, out of this cash claim.

In pursuance of that arrangement, each of the seven shareholders gave his check for the balance of his unpaid stock. The checks were handed to Mr. Hime, the secretary, at that meeting. The secretary passed on the checks to the patentees, who accepted them and gave receipts to the Company or to the shareholders, for the amount of the checks. The patentees then handed back the checks to

the secretary with the receipts, and the secretary delivered back the checks to the shareholders who gave them.

Mr. Hime said he did not know the amount of the check he gave for his unpaid stock, nor the bank he gave it upon.

Whether the other shareholders knew more of their checks than Mr. Hime, did not appear.

The evidence also shewed the defendant to have been a stockholder of the Company to the extent of \$5,000. The stock list showed he had paid 10 per cent. upon that sum before the issuing of the patent. It then appeared by the evidence of Mr. Bigelow, that when he examined the books of the Company in March, 1872, the defendant appeared to have paid upon his stock \$1,000, being 10 per cent. additional since the issuing of the letters patent.

Mr. *Hime*, the secretary of the Company, said, the defendant had paid in that additional sum; and that he paid it in consequence of the arrangement come to by the shareholders at the meeting, at the Rossin House.

There was evidence that the defendant had said to Mr. Bigelow he had paid ten per cent. on his stock, and they could not make him pay any more; and that he said to a Mr. Crossman in 1872, that he had paid ten per cent. on his stock, and he was not going to pay any more. This last was long after the meeting at the Rossin House. It was plainly shewn that he had never paid up any larger sum than the \$1,000, so that he was still a debtor to the Company to the amount of \$4,000 upon his stock, unless the transaction at the Rossin House was a payment of his stock in full.

The defendant was present at the trial and was not called. It was perfectly agreed upon before the checks were given, that they were never to be used, but were to be returned by the patentees to the shareholders; and that part of the compact was performed.

After hearing the evidence, the learned Judge was of opinion, and so stated at the time, that the facts proved did not shew a payment of the stock by the defendant, nor that a payment was ever intended to have been made, and he entered a verdict for \$521.29.

During this term, *Harrison*, Q. C., moved for a rule *nisi* under the statute, to enter a verdict for the defendants, and he cited the following cases : *Ex parte Currie*, 32 L. J. Ch. 57 ; *In re British and Foreign Cork Co., Leifchild's* case, L. R. 1 Eq. 231 ; *Guest v. Worcester, Bromyard, and Leominster R. W. Co.*, L. R. 4 C. P. 9 ; *Ashworth v. Bristol and North Somerset R. W. Co.*, 15 L. J. N. S. 561 ; *In re Marlborough Club*, L. R. 5 Eq. 365 ; *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. App. 346 ; *In re Hayford Co., Pell's* case, L. R. 8 Eq. 222, L. R. 5 Ch. App. 11 ; *In re Bosworthen and Penzance Mining Co., Jones's* case, L. R. 6 Ch. App. 48 ; *In re Pen Allt Lead Mining Co., Fothergill's* case, L. R. 8 Ch. App. 270 ; *Re Anglo Moravian Hungarian Junction R. W. Co., Dent's* case, L. R. 8 Ch. App. 768 ; *In re Tavarone Mining Co., Pritchard's* case, L. R. 8 Ch. App. 957 ; *Re Woodruff v. The Corporation of the Town of Peterborough*, 22 U. C. R. 274 ; Imperial Statute, 27 & 28 Vic. ch. 23, sec. 5, sub-sec. 27.

WILSON, J., delivered the judgment of the Court.

It need not be disputed that the patentees could out of their cash claim on the Company have paid off the unpaid stock of the shareholders ; and that a transfer on the books of the Company of so much of that cash claim from the credit of the patentees to the credit of the shareholders, would have been equivalent to a payment by the shareholders to the Company, and by the Company to the patentees.

What was and is doubted is, whether there ever was more than the semblance of a payment. The ceremonials were all carefully observed. There was only the reality or actuality of the transaction wanting to make it perfect.

The Judge was of opinion there was no payment made of the stock, nor intended to have been made ; but that the proceedings were taken for some other and collateral purpose. That purpose could only have been, and was believed to have been, for preventing creditors from resorting to the shareholders for and in respect of such part of their

stock which was unpaid; that is the purpose for which it is now used.

This view was confirmed by the fact that, when Mr. Bigelow saw the books of the Company in March, 1872, the defendant's stock stood still in his name and unpaid, excepting to the amount of \$1,000; that is, he was still a debtor in respect of his stock to the extent of \$4,000; and the defendant told both Mr. Bigelow and Mr. Crossman, as before stated, that he had paid only ten per cent. (not twenty per cent. as the books shewed,) upon his stock; and he added, in his conversation with Mr. Crossman, that he would never pay any more. He never said his stock had been paid in full by himself, or by any one or in any manner for him.

It does not diminish the doubts in this case, that the books of the Company cannot be produced, and that they have disappeared so completely and so mysteriously, that not only can they not be found, but it cannot be conjectured what has become of them, and a bill in Chancery has failed to discover them.

The absence of the books can be no prejudice to the shareholders, for they have nothing to gain by their preservation. The Company has stopped operations—is embarrassed, and insolvent. There are creditors to be paid, if they can discover the means of enforcing payment; and the absence of the books does not facilitate the creditors in making that discovery.

The judgment recovered by the plaintiffs against the Company, is founded upon a promissory note made by the Company on the 16th December, 1871, payable at one month.

The Company stopped their work in November before that, having been incorporated only on the 3rd of February of the same year.

We have examined the cases referred to and several others, and not one of them sustains the proposition that the transaction at the Rossin House was a payment of the unpaid stock, or a bar to the right of a creditor to resort

to the shareholders for payment in fact of that stock which they were pretending to have paid, and to have been paid.

We refer to *Menier v. Hooper's Telegraph Works, (Limited)*, W. N. p. 5, (17th January, 1874; *In re South Blackpool Hotel Co.*, *Migotti's case*, L. R. 4 Eq. 238; *In re China Steamboat and Labuan Coal Co.*, *Drummond's case*, L. R. 4 Ch. App. 772, 779; *In re Heyford Iron Works Co.*, *Forbes & Judd's case*, L. R. 5 Ch. App. 270; *In re Mercantile Trading Co.*, *Schroder's case*, L. R. 11 Eq. 131; *In re Richmond Hill Hotel Co.*, *Pellatt's case*, L. R. 2 Ch. App. 527; *In re Heyford Co.*, *Pell's case*, L. R. 5 Ch. App. 11; *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. App. 346; *In re Bosworthen & Penzance Mining Co.*, *Jones's case*, L. R. Ch. App. 48.

There may be a particular thing done or said by writing or without it, but however perfect that thing or writing may be in appearance or form, yet if it were not intended to be what it purports or pretends to be, it is of no effect at all: *Pym v. Campbell*, 6 E. & B. 370; *Rogers v. Hadley*, 2 H. & C. 227.

In Scotland, a writing which was in form a contract of marriage, and would have been a valid contract if it had been intended to operate as one, was held nevertheless to be no contract, because it was not made for the purpose of or with the view or intent of a marriage, but for another wholly different and collateral object: *McInnes v. More*, referred to in *Dalrymple v. Dalrymple*, 2 Hagg. Cons. Rep. 54, 101; *Stewart v. Menzies*, 2 Robinson's Sc. App. Cases, 547.

If a formal contract of marriage can be avoided when it is intended not to operate as one, there can be no difficulty in treating checks which were never to be paid as not a payment.

We are only giving the like effect to the transaction which the parties themselves gave to it and intended by it.

On these grounds we refuse the rule.

Rule nisi refused.

REGINA V. SMITH.

Indictment for murder—Conviction for assault—32-33 Vic. ch. 29, sec. 51.

On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32-33 Vic. ch. 29, sec. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault.

Per WILSON, J.—In this case there could have been no conviction for the assault, because the evidence upon the trial for murder shewed that it did not conduce to the death.

CASE RESERVED from the Court of General Sessions of the Peace, for the County of York, by John Boyd, Esquire, Junior Judge of the County Court.

The defendant was indicted for an assault on John Currie, occasioning actual bodily harm.

The defendant pleaded that at the Assizes holden at Toronto, in and for the County of York, he was "lawfully acquitted of the said offence charged in the indictment."

The Crown traversed the plea, and the prisoner joined issue.

At the trial before the learned County Judge, the record of an acquittal upon an indictment for the charge of murder was produced.

The indictment charged that one Lounsborough and the defendant "did feloniously, wilfully, and of their malice aforethought, kill and murder one Thomas Currie." Nothing was made nor desired to be made of the difference in the name between *John* Currie in the assault indictment and *Thomas* in the murder indictment.

The following evidence was also given:—

John E. Kennedy said, "I was a witness at the trial at the last assizes for the murder of Currie. The prisoner is the individual, Smith. I was one of the medical men who held a post-mortem examination on the body of Currie. There was an abrasion across the bridge of the nose, and under the right eye. I could not positively say what caused death. I could not say that death was or was not caused by external injuries. I stated at the trial (for murder), from the appearances we were not satisfied that

death was not caused by natural causes, accelerated by exposure."

Dennis Hulbert said, I was a witness at the trial of Smith for murder. I knew Currie. The day of the death of Currie, I saw prisoner make motion to hit Currie, but he was down. I saw Lounsborough take him by the hair of the head and kick him. The prisoner struck at him, but I could not say whether he hit him or not. I gave the same evidence at the Assizes. I did not think it was very serious. They were not long at him; I did not think they had beaten him badly.

The learned County Judge directed a verdict for the Crown upon the issue joined, which was rendered, and the case was reserved for the opinion of this Court, the learned Judge asking "whether, on this statement of facts and the questions of law arising therefrom, the defendant could have been lawfully indicted for assault on Currie after having been acquitted on the indictment for his murder; and whether my direction to enter a verdict for the Crown on the above plea of *autrefois acquit* was right."

In this term *M. C. Cameron*, Q. C., argued the case for the defendant.

The Consol. Stat. C. ch. 99, sec. 66, provides that "On the trial of any person * * for any felony whatever, where the crime charged includes an assault against the person, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding." The Act of 1869, 32-33 Vic., ch. 29, sec. 51, D., has, preceding the words "the jury," in the section quoted, the words "although an assault be not charged in terms." The punishment under the present Act may be for five years; the maximum under the former Act was three years. In other respects, the enactments are alike. The case of *Regina v. Ganes et al.*, 22 C. P. 185, followed the decision in *Regina v. Bird*, 5 Cox C. C. 1, 2 Den. C. C. 94, and determined that on an indictment for murder, since the Act of 1869 was passed, the persons charged

with the murder could not, on an acquittal of the felony, be convicted of an assault which did not conduce to the death of the person who was killed. The meaning of the enactment is, that the jury may convict of an assault if the evidence shews one to have been committed, however the indictment may be framed; that is, whether it charges an assault or not.

McKenzie, Q. C., contra. The evidence shows there was no homicide committed, independently of the acquittal itself. The medical testimony was, "We were not satisfied that death was not caused by natural causes, accelerated by exposure." That being so, the defendant could not have been convicted of an assault upon the indictment for murder, according to the two cases which have been cited, because no such assault could have conduced to the death of Currie. The defendant was therefore rightly convicted of an assault at the General Sessions of the Peace. He was never before acquitted of that assault, because it was never charged upon or provable against him in respect of the prosecution for the murder. The Imperial Act, 24 & 25 Vic., ch. 95, repealed the corresponding provision in the English Act, on which the question in the case of *Regina v. Bird*, arose. In the Act of 1869, ch. 20, sec. 19, murder and manslaughter are expressly excluded from the operation of that section, and this shews that they were in like manner excluded from the operation of 32-33 Vic., ch. 29, sec. 51, D.

RICHARDS, C. J.—I have gone over carefully the case of *Regina v. Bird*, referred to on the argument. The report which I have of it is in 2 Den. C. C. 94. I think all the Judges there concur that to convict of an assault, when the indictment is for felony, the indictment must be for a felony which necessarily includes an assault. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault

The crimes of rape, and cutting and wounding with intent, &c., are instances of the latter proposition; although there it is not unusual, and perhaps better, expressly to charge an assault in the indictment.

But in murder and manslaughter it is necessary to do so, for murder and manslaughter do not necessarily include an assault. The cases of death by poisoning, or by criminal omission, are instances of this. See the judgment of Alderson, B., at p. 190.

The same learned Judge at p. 126, in reply to an observation of counsel, that the words in the statute need not mean the crime averred on the face of the indictment, said, "No, it means such crime as in its nature includes an assault, even though that assault is not expressly averred in the indictment. Thus, manslaughter may or may not include an assault; a manslaughter by blows, &c., does so, and manslaughter by negligence, &c., does not. So administering poison with intent to murder does not necessarily include an assault: *Regina v. Draper*, 1 C. & K. 176, note a. It was for this reason that the Judges in *Regina v. Birch*, 1 Den. C. C. 185, suggested that the indictment should expressly aver an assault in those cases to which the statute applied."

I understand that, in the opinion of all the Judges in *Regina v. Birch*, unless the crime, as charged in the indictment, included an assault, there could be no conviction of an assault; and, in the argument, the inference was made and opinion expressed that in those cases where the crime, such as rape, &c., did include an assault, it would be better to allege an assault.

The words added in our statute "although an assault be not charged in terms," may be considered as a legislative declaration that it was not necessary in such cases to charge an assault, and therefore that it does not necessarily change the proper construction of the section from what it was before the amendment, as to the necessity of charging an assault in terms when the crime charged in the declaration does not necessarily include an assault.

Construing the section and amendment strictly in the light of the decided cases, I think we must hold that, when the indictment is for murder or manslaughter the accused cannot be convicted of the assault without an assault is charged in terms.

It must not be forgotten that in deciding this case we must look at it as if the defendant had been convicted of this assault when on the trial for the felony, in which event he would have been liable to a much more severe punishment than if convicted on an ordinary indictment charging an assault, as the one now before us is.

I think then, in this view, the defendant's plea fails, and the conviction in the sessions must be sustained.

As to the other question—though doubtless some of the eight Judges who compose the majority in *Bird's* case, take the broad ground, that on an indictment for murder or manslaughter the defendant cannot be convicted of an assault; for, if the assault contributed to the death of the person charged to have been murdered, the crime is either manslaughter or murder, or nothing else—I do not find that all the Judges assented to that view.

Mr. Justice Wightman, who concurred with the majority of the Judges, said, at p. 169, "If, in the present case, it had appeared that, at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt, whether the mortal injury was occasioned by blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of felony, I should think that they might be convicted of assault under the statute, for in that case the assault proved would have been involved in, and formed part of, the act or transaction charged as a felony in the indictment, and prosecuted as such, and though the evidence failed to establish it as a felony, it was the only transaction which was intended as felonious. If that was not felonious, there was no other."

Again, at p. 187, Patteson, J., who concurred with the majority of the Judges, said, "If, indeed, the very act or transaction which the Crown prosecutes as a felony turns out by the evidence not to be felonious, and so no felony at all is proved, then, if the assault be proved against the prisoner, he may be acquitted of felony and convicted of assault. And this may be the case even in murder or manslaughter, for it may happen that the prisoner has severely assaulted the deceased, and the death may have been supposed to have been the result of such assault, and the prisoner may have been indicted for murder or manslaughter under such a supposition, yet it may turn out in evidence that the deceased died from natural causes not occasioned, nor even aggravated or in any way affected, by the assault proved, and, in such a case, the prisoner might, I think, be convicted of an assault."

I think the doctrine here laid down might apply to the case before us, but it is not necessary to decide now whether the defendant might or might not have been convicted of the assault on an indictment properly framed, as we think this indictment was not so framed, and he could not have been convicted.

The broad ground taken by the Judges who dissented from the conclusion arrived at by the majority in *Bird's* case was, that the evidence offered on behalf of the Crown in proving the assault was so offered to prove a felony; and, until the jury pronounced upon it and said the felony was not proved, the accused was in jeopardy as to the felony from the very assault so proved, and the jury having acquitted of the felony should have convicted of the assault, if the accused was guilty of it. If he was not guilty, then the general verdict of not guilty should free him again from being put on his trial for the offence which was proved before.

Of course, an assault six months before the death of the party, and which had nothing to do with it, could not be brought in; but, if the assault was just about the time

of the death, and it was contended and attempted to be proved on behalf of the Crown that it did occasion the death, but failing to prove that, then the case contemplated by the Legislature was made out.

That seems to have been the general view of the dissenting Judges in that case, and were it not otherwise decided, we might suppose it to have been the reasonable one.

As the clause of our Statute now stands, considering the decisions that have been made on the subject in England, as well as in this country, it would seem to be of little value, and might as well be repealed.

In the American edition of 2 Den. C. C., at p. 127, note *a*, referring to *Regina v. Draper*, 1 C. & K. 176, it is said, "This case seems to shew that where the crime charged in the indictment *may* include an assault, but no assault is expressly or impliedly averred in the indictment, it will depend upon the nature of the crime, as ascertained by the evidence, whether it includes an assault or no, so as to come within 7 Wm. IV. and 1 Vic. ch. 85, sec. 11. It seems that the indictment *per se* would be an insufficient test. Comp. *Regina v. Dilworth*, 2 M. & R. 531." The case in C. & K. is opposed to *Regina v. Dilworth*, above referred to, and must be considered as over ruled in *Bird's* case.

MORRISON, J., concurred.

WILSON, J.—This case may be considered in two aspects.

Firstly, as if the indictment for murder did charge an assault, by reason of the words, "although an assault be not charged in terms," and as if a conviction for assault could be made under it.

Secondly, as if the indictment did not charge or include an assault in any manner, by the effect of the statute or otherwise, and as if a conviction for assault could not be made under it.

In the first case, the evidence shews that the assault did not conduce to the death of Currie, and the conviction is right.

In the second case, whether the assault conduced to the death or not would be of no consequence, and the conviction is also right. That really disposes of the case.

In the case of *Regina v. Bird*, 5 Cox C. C. 1, 2 Den. C. C. 94, an assault was *expressly* charged in the indictment.

In *Regina v. Ganes*, 22 C. P. 185, I assume it was not; but that the statutory form, "did feloniously, wilfully, and of his malice aforethought, kill and murder," was adopted.

Under the Consol. Stat. C., ch. 99, sec. 66, it was decided that the charge of murder in the words of the statute just given was not a *crime charged* which included an assault against the person, because murder was an offence which could be committed otherwise than by an assault.

It is said that the Act of 1869, 32-33 Vic., ch. 29. sec. 51, D., by the addition of the words, "although an assault be not charged in terms," has altered the meaning and operation of the statutory form of indictment, and that now an indictment for murder in the usual short form must, in every case, be read and construed as charging an assault, or as if it did charge an assault, and as warranting a jury to convict of an assault if the evidence sustain it, although they acquit of the felony.

It is not necessary to decide that point, for I think it does not necessarily arise here. I have no objection to express my opinion upon it, as it is a matter of the most serious importance.

I do not see that any argument can be derived from analogy, to help us, from the statutes authorizing a conviction in some cases for one offence where a wholly different one is charged in the indictment, and there is an acquittal from that charge: as, for *an attempt* to commit an offence where the proof of the commission of the offence has failed, or for endeavouring to conceal the birth of a child, after an acquittal for the murder of it; or, for embezzlement, on an acquittal of larceny; or, for larceny, on an acquittal of embezzlement; and in other cases.

There would be nothing more incongruous in permitting the conviction for an assault, if the evidence sustained it, upon an indictment for murder, when the principal offence failed, than there would in the other cases just mentioned.

The question must therefore be, What has the statute enacted?

It has declared that, "where the crime charged includes an assault upon the person, although the assault be not charged in terms, the jury may acquit," &c.

In the indictment for murder, in the statutory form, does *the crime charged* (murder) include an assault? It does not. That is, "feloniously and of malice aforethought killing and murdering another," does not include an assault.

So far then the *crime charged* does not include an assault. If it do not, does the enactment apply to such a case? I think it does not. The "crime charged," I understand to mean, *charged as appears by the indictment*, and not charged as appears by the evidence. And if *that* crime include an assault, then the party may be convicted of the assault, although it be not charged in terms.

There are offences which include an assault, notwithstanding the assault is not charged in terms, as rape, robbery, kidnapping, and stealing from the person.

In all of these cases the party, if acquitted of the principal charge, could be convicted of the minor offence with perfect propriety, because the minor is necessarily included in the greater crime charged.

In such a case there must have been an assault, although the assault be not stated in express terms to have been committed, if the principal offence were committed. And, if the principal offence were not committed, there may, nevertheless, consistently with the nature of the crime charged, have been an assault in fact.

I think too that *Mr. McKenzie's* argument is entitled to great weight, that if, under 32-33 Vic., ch. 20, sec. 19, D., on a charge of murder or manslaughter the jury are expressly

precluded from convicting one for unlawfully cutting, &c., why should they be required to convict of an assault?

It may be somewhat difficult to separate the assault, or the cutting, &c., from the murder or manslaughter, but I think it may be done.

The assault can be separated from the alleged rape or robbery, for neither of these offences might have been committed, or might not have been committed by the person charged, in which case the assault might well stand, although the principal offence failed.

It seems more difficult to make the separation when life has been taken, and the greater offence has been apparently committed. But life may be taken and no *crime* be committed, and yet there may be such a degree of culpability upon the person charged with the offence, that although he is not guilty of the crime, he is of an assault. I can conceive such a case.

In my opinion the newly added words in the Statute, "although an assault be not charged in terms," make no other difference in the operation and construction of the clause than to make it plainer or more emphatic than it was before.

These words have not enlarged and do not enlarge its operation. The section still applies to cases where the crime charged includes an assault, and to such cases only, and therefore not to an indictment for murder framed as this one was upon the statutory model.

The conclusion I have come to is, that the conviction is right, because the assault in question did not conduce to the death of Currie. And it is of no consequence in that view how the indictment for murder was framed.

And I am also of opinion, if it be material to determine, that the conviction is right because the defendant could not upon the indictment for murder, framed as it was, have been convicted of an assault.

The Court therefore determines that the defendant was rightly convicted of the assault, and it is ordered that the Judge of the County Court, as Judge or Chairman of the

General Sessions of the Peace for the County of York, or the Junior Judge of the County Court, and as such Junior Judge, and being a Judge of the said General Sessions of the Peace, shall give judgment on the defendant upon the said conviction at the next General Sessions of the Peace for the County of York.

Conviction affirmed.

MICHAEL KELLY V. PATRICK O'GRADY.

Fence viewers—Award—Operation and effect of.

An award of fence viewers directing a drain to be constructed on one man's land for the benefit of the land of another, operates as the grant of an easement on the land through which it passes, binding privies in estate as well as parties; and so long as such award remains unchanged the rights of the parties and the nature of the easement must be governed by it.

An action therefore will lie against the owner of the land through which the drain passes for obstructing it to the injury of the person for whose benefit it is required.

Semble, that such person may enter upon the land and clear out the drain to the extent to which he is bound to maintain it under the award.

DECLARATION—First count: that the plaintiff and defendant were proprietors of adjoining lots; that the surplus water from the plaintiff's lands of right passed through a certain drain or water-course thereon, and then of right from plaintiff's lands through said drain into and across the defendant's lands; and that defendant dammed up said ditch or water-course, whereby plaintiff's lands were flooded, and the crops, grass, and herbage, damaged and injured, &c.

Second count: That plaintiff and defendant were owners of adjoining lands, and there was a ditch or water-course duly made through the plaintiff's lands and those of defendant by the plaintiff and one Daniel O'Grady, then being occupant of defendant's land, according to a fence viewers' award duly made under Consol. Stat. U. C. ch. 57, and still in full force, by reason of which ditch or water-course the surplus water was wont to flow from plaintiff's land through and over defendant's lands; that the plaintiff was entitled to such flow; yet defendant dammed up the said

ditch or water-course, whereby the surplus water was penned back, and plain 's land, crops, grass, and herbage, &c., were injured.

The defendant pleaded not guilty and not possessed to each count, and seven other pleas traversing different statements in the counts respectively.

Issue.

The cause was tried at the Spring Assizes of 1873, at Ottawa, before Morrison, J.

From the evidence given at the trial, it appeared that in the year 1866, the plaintiff was the owner of part of lot 32, in the 4th concession of Rideau Front, in the township of Nepean, and that Daniel O'Grady was the owner of part of the adjoining lot 33 in the same concession. Part of plaintiff's land was low and required draining. Before this, a ditch ran across the land of Jeremiah Kelly on the same lot to a creek, when the fence viewers were there in 1866. This had been excavated by the plaintiff. His brother, Jeremiah, stopped that drain. He called in the fence viewers and they awarded on the 7th October, 1865, that Jeremiah was justified in closing the ditch or water-course. They directed that Jeremiah should give Michael Kelly full liberty and a reasonable time to make a covered drain along side of such ditch or water-course.

The plaintiff, in his evidence, shewed that the drain through his brother's land would not carry off the water; that the land between his low land and the creek through Jeremiah's land was higher than through O'Grady's; that the distance was greater to the creek than through Jeremiah's land, and that the natural drainage was through the defendant's lot, and a ditch there was beneficial to the owners of both lots.

The defendant gave evidence to the effect that until the drain through Jeremiah's land was closed, the land of the plaintiff was drained that way, and the water was not carried through defendant's land, and did not naturally flow that way, and the drain was of no benefit to the owners of that lot.

It also appeared that on the 29th September, 1866, the fence viewers, Switzer, Powell, and Graham, made an award in relation to the ditch, but the defendant's father was not present when they met, and when the plaintiff took a step to carry it out, O'Grady resisted.

He was recommended to call on the fence viewers again, and he gave a notice to one Brownlee to serve on O'Grady, and he appeared before the fence viewers. They adjourned for a week for a surveyor, when Mr. Sparks, the surveyor, the present defendant and his father, were then present and notified of the adjournment. They awarded on the 3rd of November, 1866, and the notice annexed to it, and signed by Michael Kelly, calling on the fence viewers to make the award, was dated the 17th of October, 1866.

The award of the 29th September, 1866,—after reciting the names of the fence viewers, and that they had been called upon to decide the matters in dispute between Michael Kelly and Daniel O'Grady, concerning the drainage of the land of the said Kelly; and had viewed the premises and heard and considered the proofs laid before them,—directed that O'Grady should allow Kelly, or any person in his employ, to enter upon the land of O'Grady without let or hindrance of any kind soever, for the purpose of making and keeping open a ditch of sufficient depth, width, and length, to take away all surplus water from the lowest part of the land of the said Michael Kelly.

2. That Daniel O'Grady should, within ten days from the date thereof, pay to Kelly the lawful expenses incurred by him in procuring the view and award, the said expenses amounting in the whole to \$3.

This award appeared to have been treated by all parties as a nullity; it did not appear that any notice was served on O'Grady before it was made, or that he was present and had an opportunity of being heard; or that, from its wording, it could have been carried out with any certainty.

When Kelly went under it to dig the ditch, he was resisted by O'Grady, and the recommendation to take proceedings anew was carried out.

The new notice of the 17th of October was given, and at the meeting of the fence viewers under it Daniel O'Grady and the defendant were present, and the arbitrators said they knew for what purpose they were there.

The award that was made after that by the fence viewers, which was dated the 3rd of November, 1866, appeared to have been received and filed by the Township Clerk on the same day. It recited that having received from Michael Kelly, the occupant of a part of the rear half of lot 32, in the 4th concession of the said township of Nepean, notice in writing, of which a true copy was annexed, relative to a dispute between him, said Kelly, and Daniel O'Grady, being the occupant of the adjoining rear half of lot 33, in the 4th concession of the said township, as to the opening of a ditch or water-course, for the purpose of letting off surplus water from low miry lands on the said adjoining premises occupied by the said parties respectively, and having attended at the time and place mentioned in the notice, and being satisfied that the said Daniel O'Grady had been duly notified, and the said Michael Kelly and the said Daniel O'Grady being present at the time and place aforesaid; and having examined the said premises, and heard the parties and such witnesses as they produced before the fence viewers; they awarded that they found it was for the joint interest of the parties to open the ditch or water-course thereafter described: that it should be made across the said rear half of the said lot 33, (describing its course by metes and bounds): that the said ditch or water-course should be two feet and six inches in depth, and three feet and six inches in width at the top, and one foot and six inches at the bottom; and should be so constructed that the above described line should be in the centre thereof, and so that the water should flow equally therein. They further awarded that Michael Kelly should make and maintain twelve chains and thirty two links thereof, from the said place of beginning; and the said Daniel O'Grady should make and maintain the remainder thereof, being ten chains or thereabouts; and they allowed the earth taken from the said drain to be

placed on the west side thereof, to the breadth of six feet from said drain; to cut and remove all timber of said drain; and that each of the said parties should have twelve months from the date of the award to open and finish his part of the said drain.

The plaintiff having commenced making the drain, Daniel O'Grady prevented him doing anything, and he had him summoned before a Justice of the Peace, and he was bound over.

In the fall of 1866, and the summer of 1867, the plaintiff made all the ditch he was bound to make by the award. It had the effect of carrying the water from his land, and it continued to do so until the fall of 1872, and was never interrupted by Daniel O'Grady until then.

The plaintiff was then cleaning out the drain on the defendant's lot. The defendant then took hold of him and shoved him against the bank of the drain, and prevented him doing anything. That evening he filled in the drain with clay and stones, quite up to the division line on his land, even with the surface.

In September the plaintiff attempted to open it, but the defendant prevented him, ordered him off his land, threatened him, and filled it up again about two feet over the level; and it continued it that state, flooding the plaintiff's land and preventing him using it, and injuring other drains on his lot.

Witnesses were called on behalf of the plaintiff, to shew that the water-course to drain the plaintiff's land could not be made through his brother's land, because it was higher than the plaintiff's land; that the natural outlet of the water was through the defendant's land, and that the ditch would be advantageous to the defendant as well as the plaintiff; and that the defendant had not dug the portion of the drain on his own land so as to pass the water off.

The owner of the adjoining lot, Dawson, stated that, if the defendant had completed his portion of the drain, the water would have passed off the defendant's land into a drain on his, Dawson's, land, and thence into the creek.

The defendant called witnesses to shew that before the drain through Jeremiah Kelly's land was closed, the plaintiff's land was drained through that.

One of the witnesses, defendant's brother, considered the drain was not of any benefit to him.

The learned Judge left it to the jury to say whether the defendant obstructed the drain so as to throw back water on the plaintiff's land; and, if so, they were to say the amount of the damages previous to the commencement of the action. They must be satisfied, he told them, that the drain so obstructed was the one authorized by the fence viewers to be made, and he asked them to say whether the drain authorized by the award of the fence viewers was one that would be for the mutual benefit of both parties.

At the end of the plaintiff's case, the defendant's counsel objected: 1. That there was no By-law shewn to have been passed appointing the persons who made the award fence viewers for the year 1866.

2. No copy of the award was proved to have been served on the defendant or Daniel O'Grady.

3. That the notice annexed to the award related to the rear half of lot 23, which was not the lot in question.

4. That the evidence did not support the declaration for obstructing the natural flow of the water coming from the plaintiff's land; there was no water-course shewn or established for the obstructing of which the plaintiff could have any right of action.

5. That the evidence did not support the declaration: that assuming the award to be properly made, there was no evidence the drain was made according to it, so as to give that right of action to the plaintiff.

6. There was no evidence of a demand on the defendant or Daniel O'Grady, to comply with the award to make the drain.

7. That what was done by defendant in obstructing the drain, was done by the defendant on his own land, and that he had a right to do so.

These objections were renewed as objections to the Judge's

charge, and leave was reserved to the defendant to move to enter a nonsuit, if the Court should think the action not maintainable.

The jury found a verdict for the plaintiff, damages \$100 ; and they also found that the drain in question was for the mutual benefit of both parties.

In Easter Term, 1873, *R. A. Harrison*, Q. C., obtained a rule *nisi* to enter a nonsuit, pursuant to the leave reserved

In Michaelmas Term, 1873, *C. S. Patterson*, Q. C. shewed cause. The persons who signed the award acted as fence viewers, and it was proved they were fence viewers that year, and that is sufficient : *Malone v. Faulkner*, 11 U. C. R. 116.

The statute only directs a copy of the award to be given to the party requiring the same : Consol. Stat. U. C. ch. 57, sec. 9. The putting 23 as the number of the lot in the copy of the notice attached to the award, appears on the face of it to be a clerical error ; it should be 33. It is of no consequence, no one was misled by it ; and both parties appeared before the fence viewers. It is not pretended it was a natural water-course. The decision of the fence viewers, under Consol. Stat. U. C. ch. 57, sec. 9, is binding on the parties : *Murray v. Dawson*, 17 C. P. 588, 19 C. P. 314 ; *McGillivray v. Millin*, 27 U. C. R. 62 ; *Crewson v. Grand Trunk R. W. Co.*, 27 U. C. R. 68.

Harrison, Q. C., contra. It is not intended to rely on the 1st, 2nd, or 3rd objections taken at the trial. The defendant was no party to either of the awards, but the person who was in possession was his father, and the defendant takes from him. The award of September is void on the face of it, as it does not describe the drain nor fix a time within which the work is to be done. The second award on its face seems sufficient. *Murray v. Dawson*, 17 C. P. 588, 19 C. P. 314, is contrary to the decision of the same case in this Court, 29 U. C. R. 464. The plaintiff made his half of the drain on O'Grady's land, and the award did not authorize his doing so. He never demanded

of O'Grady to make his half. The award is only binding on the parties, not on their privies in estate: *Murray v. Dawson*, 17 C. P. 588, 591. This is really a dispute between plaintiff and defendant, and the defendant was not a party to the former decision. They should have referred it again to the fence viewers: *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477. Secs. 1, 6, 9, 10, 15 inclusive, sec. 16, sub-secs. 4 & 5, and sec. 18 of Consol. Stat. U. C. ch. 57, bear upon the question.

RICHARDS, C. J., delivered the judgment of the Court.

The decided cases referred to on the argument, seem to shew that the award made by the fence viewers on the 3rd of November, 1866, is correct in form and substance.

The award made on the 29th September, was clearly bad for uncertainty, according to the case of *Murray v. Dawson*, 17 C. P. 588, and would probably have been bad as not shewing notice to or the attendance of the party as to whom the award was made.

The object and importance of the statute, is referred to by the late Mr. Justice John Wilson, in the case cited, of *Murray v. Dawson*, 17 C. P. 588.

The formal objections to the award were in effect given up on the argument, and if they were not they seem untenable.

There was reasonable evidence given to shew a notice to the defendant's father of the meeting of the fence viewers to consider the matter, and there is no doubt he was present when they were on the premises for the purpose of making the examination and award.

The award was made and lodged with the Township Clerk.

The witnesses on the trial named as fence viewers, stated they were fence viewers of the township for the year 1866, and the plaintiff appears to have completed his part of the ditch within the time prescribed by the award.

The fact that the defendant's father did not complete his part, does not in any way deprive the plaintiff, as far as we

can see, of his right to have the ditch maintained and kept open under the award, so far as relates to the part which the plaintiff himself was directed to make and maintain.

The Consol. Stat. U. C., ch. 57, is entitled "An Act respecting Line Fences and Water-courses." The first section declares that "Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof."

Sec. 7 enacts, "When it is the *joint* interest of parties resident to open a ditch or water course for the purpose of letting off surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such several parties shall open a just and fair proportion of such ditch or water course according to their several interests."

Sec. 8 provides, "Three fence viewers may decide all disputes between the owners or occupants of adjoining lands or lands so divided or alleged to be *divided* as aforesaid, in regard to their respective rights and liabilities under the Act, *and also* all disputes respecting the opening, making, or paying for ditches and water courses under this Act."

The words "*divided as aforesaid*" no doubt refer to lands drained "by any river, brook, pond, or creek," mentioned in the 6th section.

Sec. 9, makes the award binding on the parties.

Sec. 10 is that, "When the dispute is as to the commencement or extent of the part of the fence to be made or repaired by either party, or as to the *opening* of a ditch or water course, or as to the part, width, depth, or extent that any person should open or make, either party may, by writing, notify the fence viewers," &c.

Under sec. 11 the fence viewers "shall attend at the time and place named, * * and they shall examine the premises, and hear the parties and their witnesses, if demanded, and according to the subject matter of the reference shall decide the commencement or extent of the part of the fence which either party claims to have

made or repaired, or refuses to make or repair; or shall divide or apportion the ditch or water course among the several parties, having due regard to the interests of each in the opening thereof, and shall fully determine the matters in dispute."

Sec. 12, "On any reference regarding the opening or *making of a ditch or water course*, the fence viewers shall decide what length of time each of the parties shall have to *open the share of the ditch or water course which the fence viewers decide each such party shall open*; and if it appears to the fence viewers that the owner or occupier of any tract of land is not sufficiently interested in the opening of the ditch or water course to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that such ditch should be continued across such tract, they may award the same to be done at the expense of such other party; and after such award the last mentioned party may open the ditch or water course across the tract, at his own expense, without being a trespasser."

Sec. 14, "If any party neglects or refuses, upon demand made in writing as aforesaid, to open or make or keep open his share of the ditch or water course allotted or awarded to him by the fence viewers, within the time allowed by them, any of the other parties may, after first completing his own share or proportion, open the share or proportion allotted to the party in default, and shall be entitled to recover not exceeding forty cents per rod for the same, from the party so in default."

Sec. 16, directs the proceedings to be taken "To ascertain the amount payable by any person who, under the authority of this Act, makes or *repairs* a fence, or makes, opens, or keeps open any ditch or water course, which another person should have done, and to enforce the payment of such amount."

Sec. 13 provides, that "When by reason of any material change of circumstances in respect to the improvement and occupation of adjacent lots or parcels of land, an award

previously made under this Act ceases, in the opinion of either of the parties, to be equitable between them, such party may obtain another award of fence viewers by a like mode of proceeding; and if the fence viewers called upon to make a subsequent award find no reason for making an alteration, the whole cost of the reference shall be borne by the party at whose instance it has been made."

It having been established by the award and finding of the jury, that it was the *joint interest* of these parties resident on adjacent lots to open the ditch or water course for letting off the surplus water from low, miry lands, under sec. 8 of the Statute the three fence viewers were authorized to decide the disputes between the parties respecting the opening, making, and paying for such ditch or water course.

Notice having been given under sec. 10, three fence viewers, on the 3rd November, 1866, awarded that it was for the joint interest of the parties to open the ditch or water course, which they describe, across the rear half of lot 33, the course, size, and depth of which they described; and they determined that Kelly, the plaintiff, should make and maintain twelve chains and thirty-two links thereof, and Daniel O'Grady should make and maintain the remainder thereof, being ten chains, and that the parties should each have twelve months to open and finish his part of the said drain. The plaintiff went on and finished his part of the drain within the twelve months.

Now what was the effect of all this as between the parties then occupying and owning these adjoining lots? This drain on the land of Daniel O'Grady was made under the authority of the Statute by the plaintiff. What were the plaintiff's rights as to this drain?

It must be that it was an easement which he possessed in O'Grady's land, to the extent at least of having the water flow through it without interruption by any act of O'Grady's, or those claiming under him. It would be wholly inconsistent with the intention of the Statute, if

the next day after the ditch was dug O'Grady should have been permitted to close it up so as to throw back the water on the plaintiff's land.

Then could any one who claims the land under O'Grady be in any better position as to this matter than O'Grady himself, as long as the award of the fence viewers remains unchanged. We see no reason why he should. The right is in the nature of an easement in the land.

If any subsequent owner or occupier could shew that from the material change of circumstances in respect to the land the award was unjust, a new award might be obtained under Consol. Stat. U. C., ch. 57, sec. 13; and now, by the amending Act, 32 Vic., ch. 46, sec. 7, O., it would seem that any party affected by the decision of the fence viewers may appeal to the Judge of the County Court against their decision: *In re McDonald and Cattanach*, 30 U. C. R. 432.

Under the facts of this case it is not necessary to decide whether the plaintiff would have the right to go on the defendant's land and clean out the drain to the extent that he was bound to maintain it under the award. It would appear reasonable that he should.

In *Liford's* case, 11 Co. Rep. p. 52 *a*, it is stated, "The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit on the land of another, to enter into the land to mend it when occasion requires it, as it is resolved in 9 Ed. IV., 35 *a*; so it is agreed in 2 R. 2 Bar. 237."

See also *Washburn* on Easements, 2nd ed., 656. *Peter v. Daniel*, 5 C. B. 568; *Lord Egremont v. Pulman*, Moody & Mal. 404; *Bell v. Twentyman*, 1 Q. B. 766; *Pomfret v. Ricroft*, 1 Wms. Saund., 2nd ed., 557, notes 5 & 6; *Hodgson v. Field*, 7 East, 613; *Shackleton et al. v. Sutcliffe*, 1 DeG. & S. 609.

The evidence shews clearly that the plaintiff filled up the water course by putting in stone and clay just on the line of his own land, and that the effect of this obstruction was to pen back the water on the plaintiff's land, doing him

serious injury. The damages given by the jury are not unreasonable, considering the extent of the injury.

If the injury to the plaintiff's land had arisen from the drain or ditch having been filled up from natural causes, and because the defendant would not allow the plaintiff to come on to his land to cleanse it, and the plaintiff claimed the right to recover damages for that cause, the declaration would have been differently framed.

The reasonable interpretation to put on this Statute, when the fence viewers award that a drain shall be constructed through one man's land for the benefit of the land of another, is that the award shall be considered as the grant of an easement on the land through which the ditch is to be cut, and as long as the award remains unchanged, the nature of the easement and the rights of the parties must be governed by the award.

Here the plaintiff had the right or easement to have the water flow from his land over and across the defendant's through the water course; and the defendant having obstructed that drain to the plaintiff's injury, the action lies, and this rule must be discharged.

Rule discharged.

CROMBIE v. JACKSON (a).

Insolvent Act of 1869, sec. 50—Construction of.

Declaration for entering a mill and taking and converting plaintiff's goods. Plea, in substance, that the plaintiff's claim to the goods and mill is only under a mortgage made by one W., who, before the grievances complained of, made an assignment under the Insolvent Act of 1869, to defendant of all his estate and effects, including this mill and goods, subject to plaintiff's mortgage: that W. was then in possession of the premises, and such possession was transferred to defendant, who took possession as such assignee; and except as assignee defendant has in no way interfered with the mill or goods: that the plaintiff's alleged right of property can be determined by the County Judge; and that this Court has no jurisdiction to try the same. *Held*, on demurrer, plea good, the plaintiff, under the facts stated, being restricted by sec. 50 of the Insolvent Act of 1869 to the remedy there given.

Held, also, that that section was not beyond the power of the Dominion Parliament as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency.

DEMURRER. Declaration—First count: That the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods: that is to say, one spinning-jack, made by Davis & Furbis, with 240 spindles two-inch pitch, and with 24 ends to the drum, 1 jack-knife, and 1 broad Crompton loom.

Second count: Trespass, for taking the same goods.

Third count: That the defendant broke and entered a certain messuage and woollen mill, called the "Baden Woollen Mills," in the Village of Baden, in the County of Waterloo, and removed, took, and carried away the fixtures and goods of the plaintiff therein, and disposed of the same to the defendant's own use.

Sixth plea: that the plaintiff's claim and title to the goods in the first and second counts of the declaration mentioned, and to the messuage and woollen mill and goods and fixtures in the third count mentioned, is only under and by virtue of an indenture of mortgage, made by

(a) This and the following seven cases were heard before WILSON, J., sitting alone, under the Administration of Justice Act, 1873.

one Charles Woodhead : that the said C. W. was a trader within the meaning of the Insolvent Act of 1869 : that being such trader, before the committing of any of the grievances and trespasses in the declaration mentioned, the said C. W. became insolvent, and after the making of the said mortgage made an assignment under the provisions of the said Insolvent Act to the defendant, who then was, and still is, an official assignee under the authority of the said act for the County of Waterloo, in which county the said C. W. then resided and carried on business, of all the estate and effects of the said C. W., for the benefit of his creditors, and among which estate and effects were the said jack and loom, messuage and woollen mill, goods and fixtures in the declaration mentioned, subject to the said mortgage of the plaintiff on the said messuage and woollen mill and on certain machinery therein specified and particularly mentioned, but not mentioning therein the said jack and loom, and in which said messuage and woollen mill the said jack and loom were situate at the time of the making of the said assignment; and thereupon the said defendant became and was the duly appointed Interim Assignee of the estate and effects of the said C. W., and the said defendant afterwards was duly confirmed in and appointed to the office and position of assignee of the estate and effects of the said C. W., at the first meeting of the creditors of the said insolvent duly called under the provisions of the said act; "and at the time of making the said assignment in insolvency the said insolvent was in possession of the several premises aforesaid, and the said possession was, at the time of the said assignment, transferred to the defendant," and the defendant then took possession of the said spinning-jack, loom, messuage and woollen mill, goods and fixtures in the declaration mentioned, as such assignee in insolvency; and except in his capacity as such assignee of the said insolvent, he has in no manner meddled or interfered with the said spinning-jack, loom, messuage, mill, goods, or fixtures; and that under and

by virtue of the said Insolvent Act, the plaintiff's alleged right of property could and can be inquired into and determined by the order of the Judge of the County Court of the County of Waterloo, on summary petition, in vacation, or by a rule of the said County Court in term, and cannot be enquired of or determined in this suit, and this Honourable Court has no jurisdiction to try or determine the matter involved in the claim of the plaintiff in the said declaration for the causes above alleged.

The plaintiff demurred to this plea on the grounds: that section 50, of the Insolvent Act of 1869, only applies in case the assignee rightfully acquires possession of property, or in case the debtor at the time he becomes insolvent is in actual possession of property, claiming it as his own, and the assignee acquires actual possession from or through him; and there is no averment in the plea that the debtor, at the time of his insolvency, was in actual possession, and the plea admits that the possession of the assignee, as is alleged in the several counts of the declaration, is a tortious possession as against the plaintiff.

2. If a broader interpretation than the foregoing be attempted to be placed on section 50 of the Insolvent Act, and the Court hold that the enactment is capable of such an interpretation, it is submitted that the enactment is unconstitutional, in this, that it affects property and civil rights, subjects which are under the exclusive control of the Legislature of the Province of Ontario.

3. For all that is shewn in the plea the goods and fixtures, messuage, and woollen mill, were, at the time of the insolvency and of the alleged trespass, in the possession of the plaintiff, under and by virtue of the mortgage, and the plea fails to shew any matter of excuse or justification for the alleged trespass.

4. The plea does not traverse or confess the matters alleged in the several counts of the declaration, and does not shew any facts which oust the jurisdiction of the Court.

5. The plea is in law no answer to the declaration.

Joinder.

Harrison, Q. C., for the demurrer. This case is not within the operation of the 50th section of the Statute. It never was intended to compel parties to try their legal rights in the Insolvent Court, when the question is not about ranking or claiming on the estate, but relates to a trespass or wrongful disposition of property claimed by another adversely to the insolvent and his assignee. The plaintiff had not proved on the estate, and was not obliged to do it. He looked to the security of his mortgage, under which he had the legal title to the property in question, and he should not therefore and could not legally be deprived of it. *Archibald v. Haldan*, 30 U. C. R. 30, is a decision expressly in favour of the plaintiff. The later case of *Dumble v. White*, 32 U. C. R. 601, is not consistent with the former one, and is not in accordance with the statute.

If this be a case within the statute, and this Court has lost its jurisdiction by reason of that enactment, the enactment itself must be illegal and unconstitutional, because such legislation is an interference with property and civil rights: The British North America Act 1867, sec. 91 subsec. 21, sec. 92 subsec. 13.

If the enactment is not invalid, the following sections of the Insolvent Act shew what property the assignee takes: Sections 10, 29, 116 and sections 82, 83, 137 shew cases in which the parties would be compelled to resort to the ordinary Courts of the province. Section 50 is a clause also which is not to be used by itself; it is one of a group commencing with section 36, and headed "*Of assignees.*" The plea is not as full as it should have been. It does not deny a conversion of the property absolutely, but says that "except in his capacity as assignee the defendant had in no manner meddled or interfered with the property," which may be true, and as assignee he may have converted the property. He referred to *Kinning v. Buchanan*, 8 C. B. 271; *Earl Shaftesbury v. Russell*, 1 B. & C. 666; *Mayor, &c., of Lichfield v. Simpson*, 8 Q. B. 65; *The Vestry of the Parish of St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Rochdale Canal Co., v. King*, 14 Q. B. 122; *Atkinson v.*

Newcastle and Gateshead Water Co., 20 W. R. 35; *Cates q. t. v. Knight*, 3 T. R. 442; *Timms v. Williams*, 3 Q. B. 413.

M. C. Cameron, Q. C., contra. The plea is sufficient in substance in all respects. It shews the defendant took possession as assignee, and that the insolvent had the possession, not the plaintiff, at the time of the assignment, and that excepting as assignee he in no manner meddled or interfered with the property. That allegation seems to be reasonably sufficient, for if the defendant got possession as assignee, and never except as assignee meddled or interfered with the property, it shews he acted throughout as assignee only. It was not necessary he should have stated more, and he need not have stated so much, for the plea would have been sufficient if it had merely set out that the defendant took possession of the property as assignee from the insolvent, who had the possession when he assigned: *Dumble v. White*, 32 U. C. R. 601 is expressly in favour of the plea.

As to the constitutional question raised, the legislation objected to is valid beyond all doubt, because the Dominion Legislature has exclusive authority in matters of insolvency: The British North America Act 1867, sec. 91 subsec. 21. He referred also to *Regina v. Boardman*, 30 U. C. R. 553.

WILSON, J.—Assuming the plea to be sufficient in substance, as shewing a good defence if the law be as it is contended it is by the defendant, I think there is no constitutional difficulty presented here.

The exclusive legislative authority respecting bankruptcy and insolvency is vested in the Parliament of Canada, and there is no interference with property and civil rights beyond what has been considered to be expedient for the purpose of making the proceedings in insolvency more efficient.

As an abstract proposition, it may be affirmed that if the Dominion Legislature were to enact that some of the exclusive matters vested in the Parliament, for instance

"Bills of Exchange and Promissory Notes" should be litigated only in a particular local Court, say the Division Court, and not in any other Court whatever, such an enactment would be unconstitutional, because it would be an encroachment on the exclusive powers which are vested in the Provincial Legislature to make laws, under section 92 subsection 14, respecting "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

It would interfere rather with that provision than with sub-section 13 of the same section, "Property and civil rights in the Province," because the Parliament of the Dominion has express authority to interfere with property and civil rights here, so far as they are affected by legislation of the Parliament concerning "Bankruptcy and Insolvency."

But I think it is not in this matter an enactment beyond the power of the Parliament of Canada, because at the passing of the British North America Act there was a system of proceeding in insolvency in force in the two former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869, excepting, it may be, as to the provisions contained in the 50th section, to which I shall refer. And the British North America Act must be presumed to have been passed, as Acts of Parliament always are presumed to be passed, with a knowledge by the Legislature of the then existing law and of the decisions of the Courts upon the matter which is the subject of legislation.

The 50th section does not confine redress to any particular Court or person, nor exclude recourse being had to any other Court. It prescribes a certain order of procedure to be observed respecting the subjects within the operation of the section. The provision is they shall be disposed of by the Judge of the County Court, or by the County Court on petition, and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever.

But that is subject to the right of appeal, under the 83rd section of the Act, to either of the Superior Courts of law or to the Court of Chancery, or to any of the Judges of these Courts, which was the provision of the law that was in operation when the British North America Act was passed. See the Insolvent Act of 1865, ch. 18, sec. 15.

I do not think there is in this case, and on the point now raised, any valid objection established against the constitutionality of the enactment in question.

The chief argument on the demurrer was whether by the 50th section of the Insolvent Act the plaintiff was compelled for the causes of action declared upon, and on the facts disclosed by the sixth plea, to resort for redress to the County Court of Waterloo, or to the Judge of the County Court, and was debarred of redress in the first instance in any of the ordinary Courts of the Province.

The statute says that "all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property upon, in, or to any effects or property in the hands, possession, or custody of the assignee, may be obtained by an order of the Judge on summary petition in vacation, or of the Court on a rule in term, and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever," and obedience of the assignee to the order or rule is enforceable by imprisonment or dismissal.

This language is very plain. The object was to establish a special tribunal in the first instance for the disposal of such matters for the benefit of the debtor and the creditors, to prevent litigation being carried on by any one prejudicial to the estate, to prevent the assets being dissipated by lawsuits, and to have all such matters decided upon promptly by a summary petition presentable at any time to the County Court or to the Judge of it, and specific relief afforded at once if the applicant were entitled to it, under pressure of very severe punishment.

This method is certainly better for all parties than any remedy which replevin or a bill for specific performance

would afford, and it is better than treating the assignee as a trespasser or a wrong-doer by some supposed or implied act of conversion, merely because by process or provision of law he has performed a *quasi* public duty, not for his own benefit, but for others of whose rights he is the guardian: *Ex parte Baum—In re Edwards*, L. R. 9, ch. 673.

It is not disputed that the jurisdiction of the Superior Courts is not taken away, unless by express words or necessary implication.

Where, in case of a seizure for non-payment of rates, it was provided "that if any question or difference shall arise upon taking such distress, the same shall be determined and ended by two or more of such commissioners." It was held that as the matter was not determinable by the commissioners only, the jurisdiction of the Superior Courts was not taken away: *Earl of Shaftesbury v. Russell*, 1 B. & C. 666, 673; *The Rochdale Canal Co. v. King*, 14 Q. B. 122. In this last case the statute was held not to be applicable to wrong-doers, but only to those persons who were claiming rights from the company.

Where Justices have power to mitigate a penalty, it was held the direction that it should be proceeded for before them took away the jurisdiction of the Superior Court by necessary implication: *Cates q. t. v. Knight*, 3 T. R. 442.

When the remedy before the justices, commissioners or other persons, is not sufficiently large to cover all cases, that is one ground for holding that remedy not to be the only one, and that the jurisdiction of the Courts is not taken away: *Mayor, &c., of Lichfield v. Simpson*, 8 Q. B. 56; *Shepherd v. Hills*, 11 Ex. 55; *Vestry of the Parish of St. Pancras v. Batterbury*, 2 C. B. N. S. 477, 486.

When a new obligation is created and a remedy given by statute, that is, in general, the only one. See the case last mentioned.

The words in the 50th section are, "that the remedy may be obtained by an order of the Judge or a rule of the Court, 'and not by any suit, * * or other proceedings of any kind whatever.'" These words are very positive, and are much more than mere 'necessary implication.'

I refer, as to the question of jurisdiction, to the cases of *Martin v. Powning*, L. R. 4 Ch. App. 356; *Stone v. Thomas*, L. R. 5 Ch. App. 219; *Zealley v. Veryard*, L. R. 1 P. & D. 195.

I am not prepared to say that a mortgage creditor can realize his security on the insolvency of the mortgagor only under the Insolvent Act, or what is about, if not quite, the same thing, must come in and prove his claim. Perhaps he is not. If he is in possession of the property mortgaged to him, he is not to be deprived of it without paying him the amount of his claim: Sec. 10. And if the assignee is in possession of the property the mortgagee may get it by order or rule of the Judge or the Court: sec. 50; and if he prove his claim the security may be dealt with, under secs. 58, 60, 61, 62.

In the case of an insolvent mortgagor, the assignee is interested in the property affected by the mortgage, more or less, according to its value relatively to the claim upon it; and if the mortgagor be in possession of it and transfer that possession to the assignee, the latter cannot be a wrongdoer by taking that possession; and, so far as I see, in keeping possession in right of the creditors he represents, for they may pay off the mortgagee, under sec. 10, until an order is made upon him by sec. 50 to deliver it to the mortgagee.

If a writ of attachment had issued [on a compulsory liquidation, the Sheriff must have taken possession of all the insolvent's estate, and of that part of it certainly which he had in possession, and it must ultimately have been delivered over to the assignee. It never was intended the Sheriff or assignee should be harassed with an action—the assignee, at all events, by sec. 50, for simply maintaining the possession which the mortgagor, I must assume, rightfully had at the time of his insolvency, and when it was taken possession of by those who have acquired his rights under the Act.

I cannot, on the face of the plea, assume that there has been any other act done than is there stated, with respect to the property in question, by the defendant. The plaintiff,

in his declaration, describes these acts as a trespass and a conversion. The defendant shews that what he did do was neither a trespass nor a conversion; that he had the right to do all he did do as representing the mortgagor.

The plea, in substance, is a good defence, according to the two cases cited, which were decided by myself, and according to the opinion which I still retain.

I do not say that a mere stranger to the estate and to the insolvent, who was asserting a right to property of which the assignee, through the insolvent, had possessed himself—not a creditor at all, or having security from the debtor, and not in any way in privity with him as respected the property in dispute—would be obliged to proceed under the 50th section, because that case has not arisen (*a*), but there is room for argument, that even in such a case the assignee is as much entitled to be protected from a suit at law in the first instance as when the claimant of the property is a mortgagee, and one who has not proved his claim.

I think the plea is not defective in substantial form either.

In my opinion, there must be judgment for the defendant.

Judgment for defendant.

(a) See *Burke v. McWhirter*, 35 U. C. R. 1.

THE CORPORATION OF THE COUNTY OF WENTWORTH v. THE CORPORATION OF THE CITY OF HAMILTON (a).

Maintenance of city prisoners in county gaol—Agreement therefor—Municipal Act of 1866, sec. 401, et seq.—Necessity for corporate seal—Action—Pleading—Amendment.

Declaration by a county against a city corporation, for compensation for the care and maintenance, by the plaintiffs, in the county gaol, of prisoners: under sec. 403 and following secs., of the Municipal Act of 1866, alleging an agreement made on the 6th June, 1867, by which, after deducting the amount paid from the Administration of Justice fund, the balance of the expenses were to be paid equally by plaintiffs and defendants; that the sums payable for the food and clothing of the prisoners committed to said gaol by some competent authority in the city, during the years 1867 to 1870, inclusive, amounted to \$5,429, and, though defendants had paid part of it, and their half of the other expenses as agreed on, yet they had not paid the residue, although they had in each of said years sufficient money belonging to the city applicable to municipal purposes generally, and still hold moneys not specially appropriated to other purposes more than enough to meet plaintiffs' demand, and, although defendants levied in each of said years for the purposes of said demand moneys out of which they might and ought to have satisfied it. A common count was added for food furnished by plaintiffs at defendants' request to the prisoners sent to said gaol from defendants' municipality.

Defendants pleaded to each count that the alleged agreement was not under their seal; and to the whole declaration that the claim under both counts was the same; and that said cause of action, if any, arose for a debt alleged to be incurred, and falling due during the said years, which was not within the ordinary expenditure of defendants during said years, and for which no estimate was made by defendants, nor any by-law passed for the creation of such debt, nor for imposing a special rate for payment of it.

On demurrer, *Held*, 1. That the first two pleas were bad, because the agreement was one which defendants might enter into without deed; and as to the second plea, because, also, the common counts cannot be founded upon a deed, and the plea was, therefore, inappropriate.

2. That the declaration was good: that it was unnecessary to allege defendants' contract to be by deed, and that it was not requisite that the sum payable should be a *fixed* annual amount.

3. That the last plea was bad: that the plaintiffs' inability to enforce payment was no reason why they should not recover a judgment; and that the claim for support and maintenance of the prisoners was within defendants' ordinary expenditure: that no estimate, by-law, or rate, might have been necessary, for there might have been other means for satisfying the demand; the averment that defendants had sufficient money applicable to general purposes, and not specially appropriated, was not denied; and the allegation that defendants levied in each year for the demand moneys out of which they should have paid it, was a sufficient averment that the demand was, in each year, specially provided for, so that the fund could not rightfully be devoted to other purposes.

The first count referred in two places to prisoners committed to the gaol by

(a) Heard before WILSON, J., alone. See note at p. 575.

competent authority, "within" instead of "of" the city, but this not being a ground of demurrer an amendment was allowed, and judgment given for plaintiffs.

DEMURRER.

Declaration: First count, that the plaintiffs during the time hereinafter mentioned were bound by law to preserve and keep in repair, the court house and gaol of the County of Wentworth, and provide the fuel, wood, and other supplies required for the same. And the defendants, being a municipality not separated for all purposes from the county of Wentworth, and being situate within the same, did from and after the 1st of January, 1867, continuously to the time of the commencement of this suit, use the said court house and gaol, and thereupon became liable to pay to the plaintiffs such compensation therefor, and for the care and maintenance of persons committed to the said gaol by any competent authority within the said city, as should be mutually agreed upon, or be settled by arbitration under the Municipal Institutions Act. And thereupon it was agreed, on the 6th day of June in the year last aforesaid, by and between the plaintiffs and the defendants, that, after deducting the amount paid from the administration of justice fund, the balance of the expenses for salaries of the gaoler, turnkey, and matron, necessarily connected with the management of the gaol and court house, and also the wood and other expenses connected therewith, should be borne equally by the plaintiffs and the defendants, and that the defendants should pay the full expense of the food and clothing furnished for the prisoners sent from the city, which agreement was to take effect from the 1st day of January, 1867, and has ever since remained in force, and has not been put an end to in any way:—That the sums payable for the food and clothing of the prisoners committed to the said gaol by some competent authority within the said city during the years 1867, 1868, 1869 and 1870, amounted to a large sum, to wit, the sum of \$5,429.72; and although the said defendants paid the sum of \$2,714.86 on account thereof, and paid their moiety of the other expenses so

agreed on, yet they have not paid the residue, but have hitherto refused to pay the same, although the defendants had in each of the years aforesaid, during which the said sums became due and payable, sufficient money belonging to the said city applicable to municipal purposes generally, and still hold moneys not specially appropriated to other purposes more than sufficient to meet the plaintiffs' demand, and although the defendants levied in each of the said years for the purposes of the said demand divers sums of money out of which they might and ought to have satisfied the plaintiffs' demand—wherefore, and by force of the statute in that behalf, an action hath accrued to the plaintiffs to demand and recover the balance of the said sum so due as aforesaid.

Second count : And for money payable by the defendants to the plaintiffs for food furnished by the plaintiffs at the request of the defendants, to the prisoners sent to the gaol of the plaintiffs from the municipality of the defendants, and for other moneys paid by the plaintiffs for the defendants at their request, &c.

Pleas : 4. To the first count: that the agreement alleged was not under the seal of the defendants.

6. To the remainder of the declaration, that the contracts alleged were not under the seal of the defendants.

7. To the whole declaration, that the plaintiffs seek under the common *indebitatus* counts of the declaration to recover for and in respect of the cause of action in the first count alleged, and not in respect of any other or different cause of action : that the claim and demand of the plaintiffs set forth in the first count of the said declaration is the claim and demand, and none other, which the plaintiffs seek to recover under the remaining count of the said declaration : that the plaintiffs' said cause of action, if any, arose for and concerning a debt alleged to be incurred and falling due during the years in the first count mentioned by the defendants, being a municipal corporation, and for which said alleged debt, which was not within the ordinary expenditure of the said corporation during the said years, no

estimate was made by the defendants, nor by any by-law passed by them for the creation of such debt, nor for imposing any rate over and above and in addition to all rates whatsoever for the payment of the "said debt.

Demurrer to the fourth plea, on the ground that it is not necessary for such an agreement as is set forth in the first count to be under seal.

Demurrer to the sixth plea, on the ground that the consideration being executed, and the defendants having had the benefit thereof, it is not competent to the defendants to evade their liability by reason of the original agreement not being under seal.

Demurrer to the seventh plea, on the ground that the plea affords no answer: that it is admitted that there were funds on hand and unappropriated sufficient for the payment of the debt referred to, and it can be no defence that the defendants wrongfully neglected to make an estimate; that the traverse is too large, and tenders an immaterial issue.

Joinder.

Exceptions to the declaration, on the grounds that the declaration discloses no cause of action by the plaintiffs against the defendants: that the declaration does not allege a contract under the seal of the defendants: that the amount of compensation to be paid by the defendants to the plaintiffs for the use of the court house and gaol, and for the care and maintenance of prisoners, should be a certain annual sum, and not a ratable division of expenses; and that such an agreement as is alleged in the declaration is not authorized by the Municipal Institutions Act.

Burton, Q. C., for the plaintiffs. The clauses of the statute to be referred to are 29-30 Vic. ch. 51, secs. 401-404.

As to the first count, the objection that the contract is not under seal is not a cause of demurrer; the fact must be made to appear by plea. The last exception to the declaration is not maintainable. *Municipal Council of Middlesex v. Mayor, &c., of London*, 14 U. C. R. 324, was decided upon the 12 Vic. ch. 81, sec. 200, which required

an annual sum. The law is now different, and was probably altered in consequence of that decision.

As to the sixth plea, there is no seal necessary to any contract to cover the claims set forth in the common counts: *Jefferys v. Gurr*, 2 B. & Ad. 833; *Hall v. The Mayor, &c., of Swansea*, 5 Q. B. 526; *Beverley v. The Lincoln Gas Light and Coke Co.*, 6 A. & E. 829. If there is any supposable case in which the defendants may be liable on the common counts, the plaintiffs must be entitled to succeed.

As to the fourth plea, it was not necessary the contract in the special count should have been under seal. The obligation of the defendants is created by statute. The agreement is merely to ascertain the amount of compensation, and such an agreement between them could have been made without seal. The rule is in dealings by corporations to look at the purposes of their incorporation, and if the act done be within their powers, and in the execution of the objects for which they were incorporated, their contracts and acts are valid, although they are not made or done under their common seal: *Pim v. Municipal Council of Ontario*, 9 C. P. 304; *Henderson v. The Australian Steam Navigation Co.*, 5 E. & B. 409; *Nicholson v. The Guardians of the Bradfield Union*, L. R. 1 Q. B. 620; *Haigh v. The Guardians of North Bierley Union*, E. B. & E. 873; *The South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463; S. C. in Ex. Ch., L. R. 4 C. P. 617; *Brown v. The Corporation of the Town of Belleville*, 30 U. C. R. 373.

The seventh plea, which is pleaded to the whole declaration, must be objectionable as a defence to the first count, because although there were no estimates made for the moneys in question, nor any by-law passed to raise them, still if the money was in fact raised to pay these claims, as the first count expressly alleges was the case, the plaintiffs must be entitled to recover.

Harrison, Q. C., and *Mackelcan*, contra.

There is no difference as to the liability of corporations in equity at law: *Houck v. The Town of*

Whitby, 14 Grant 671; *Crampton v. The Varna R. W. Co.*, L. R. 7 Ch. App. 562.

As to the fourth plea. Section 403 must mean that the agreement shall be under seal. The act intended to make no change in the mode of contracting by corporations: And section 404 must be construed as providing for the raising of a specific sum and not a fluctuating one depending on the number of prisoners. If there be no agreement made between the two corporations the remedy is then by arbitration. There is no case which determines that in a case like the present a seal can be dispensed with by these corporations. Municipal bodies are different from trading corporations: *Dyte v. St. Pancras Board of Guardians*, 27 L. T. N. S. 342; *Calvin v. The Provincial Insurance Co.*, 20 C. P. 21; *Bartlett v. The Municipality of Amherstburgh*, 14 U. C. R. 152; *McLean v. The Town Council of the Town of Brantford*, 16 U. C. R. 347; *Wingate v. The Enniskillen Oil Refining Co.*, 14 C. P. 379; *The London Dock Co. v. Sinnott*, 8 E. & B. 347.

The case of *The Municipal Council, &c., of Middlesex v. The Mayor, &c., of London*, 14 U. C. R. 337, although decided under a different enactment on the same subject from the present one, is yet a decision in favour of the yearly sum being a specific instead of a variable amount. The fact too that the present enactment requires the agreement to be *revised* every five years shews that a round annual sum was intended to have been provided for on the agreement between the two bodies; for it would have been unnecessary to have provided for the revision if there had been a *pro rata* sum payable, because that would have regulated the yearly payment of itself without the necessity of a revision.

The first count shews an agreement beyond the power of the city to enter into; or if not beyond its power, it shews a kind of arrangement which should have been executed in the most formal manner. The agreement as set out is that the city shall pay for the maintenance of all prisoners "committed to the gaol by any competent author-

ity within the city," and the claim made is for the support of such prisoners. That allegation would compel the city to support wholly at its own expense, not only prisoners committed by the local authorities of the city, but all prisoners tried and sentenced by the Judge of the County Court, the General Sessions of the Peace, and the Courts of Oyer and Terminer and General Gaol delivery, although all these authorities are exercising the criminal jurisdiction for the whole County of Wentworth. Such an agreement in a deed would not be binding on the defendants. The common counts are equally open to objection.

As to the seventh plea, the claim made is not for "an ordinary expenditure," nor is it payable by by-law. In *Cross v. The Corporation of the City of Ottawa*, 23 U. C. R. 288, it was held that the building of a drain was not an ordinary expenditure, and as there was no by-law sanctioning the work the contractor could not recover for it, although the contract there was under seal. See also *Scott v. The Corporation of the Town of Peterborough*, 19 U. C. R. 469; *Re Johnson and the Trustees of School Section Thirteen in Harwich*, 30 U. C. R. 264; *Southampton Dock Co. v. Southampton Harbour and Pier Board*, L. R. 14 Eq. 595; *Regina v. Read*, 13 Q. B. 524.

The plaintiffs allege there were moneys sufficient to pay them in the hands of the defendants, but that will not entitle the plaintiffs to claim such money, because it belongs to a wholly different set of ratepayers. The yearly claims should have been presented by the plaintiffs to the defendants year by year for payment, and as that was not done the money is not recoverable: *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 20 C. P. 49, 63, 30 U. C. R. 584, 32 U. C. R. 348; *The Corporation of the County of York v. The Corporation of the City of Toronto*, 21 C. P. 95, 22 C. P. 514.

The defendants also contend that cities which have not separate judicial courts are not liable for the maintenance of prisoners more than they are for the use of the court house.

Burton, Q. C., in reply. We admit the money should

have been claimed year by year, but in this case it made no difference, because the money was raised by the defendants specially for the plaintiffs, year by year, and so was applicable to the payment of this demand, and to no other purpose. If the allegation referred to be objectionable as to prisoners committed by any competent authority *within* the city, it may be amended by striking out *within* and making it *of*, which is all that is meant and which is according to the fact.

WILSON, J.—The sections of the Municipal Act of 1866 bearing on this case are, as stated, contained in sec. 401 and the three following sections.

Section 401 enables County Councils to pass by-laws “for erecting, improving, and repairing a court house, gaol” * * and to “preserve and keep the same in repair, and provide the food, fuel, and other supplies required for the same.”

Section 402 provides that “The gaol * * of the county in which a town or city, not separated for all purposes from a county, is situate, shall also be the gaol * * of the town or city, and shall in the case of such a city continue to be so until the council of the city otherwise directs * * and the sheriff, gaoler and keeper of the gaol * * shall receive and safely keep until duly discharged all persons committed thereto by any competent authority of the town or city.”

Section 403 is, “While a city or town uses the court house, gaol * * of the county, the city or town shall pay to the county such compensation therefor, and for the care and maintenance of prisoners, as may be mutually agreed upon, or be settled by arbitration under this Act.”

By section 404 the compensation may be re-considered after the lapse of five years. The city is liable to make compensation to the county for the use of the gaol, and for the care and maintenance of prisoners. That compensation is to be such as is mutually agreed upon, or which is settled by arbitration under the act.

There has been no arbitration. If there had been, the

appointment of the arbitrator must have been "in writing under the hands of the appointors, or, in case of a corporation, under the corporate seal, and authenticated in like manner as a by-law."—Sec. 353, sub-sec. 8.

The award when made must be "in writing under the hands of all or two of the arbitrators," &c.—Sub-sec. 14.

In several cases a contract has been held to be binding when the contract has not been under the seal of the corporation, but it should have been.

A corporation was held entitled, on the authority of prior cases to the same effect, to sue for use and occupation, or to treat the occupier as a tenant from year to year, and to sue the tenant for dilapidations caused by non-repair: *The Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 162.

A corporation agreeing, not under seal, was held to be entitled to enforce specific performance of the contract against one who had contracted to take a lease: *Steevens's Hospital v. Dyas*, 15 Ir. Ch. 405.

In like manner it may on such a contract be enforced against a corporation if there be good consideration or part performance proved: *Wilmot v. The Corporation of Coventry*, 1 Y. & C. 518; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 678, affirmed L. R. 6 Ch. App. 551.

But when the claim is for money only, equity will not enforce the contract against a corporation, although the other party has no remedy at law by reason of the contract not being under the seal of the corporation: *Crampton v. The Varna R. W. Co.*, L. R. 7 Ch. App. 562.

In that case the contractor of a railway company built cottages in a substantial manner on the land of the company, at the verbal request of the agent of the company, and left them on the land on the promise that the company would pay him £5000. The agent afterwards agreed with the contractor to pay him £500 [a year as rent, with an option for the company] to purchase for £5000. That verbal agreement was confirmed by a resolution of the board of directors. The company paid the £500 a year for some

years and then refused to pay any longer. It was held it was a mere money demand, and could not be enforced in Chancery, and that the contractor had no equity because the contract was not under seal and he could not sue at law. And as the contractor did not act in ignorance of the rights of the company, he could not obtain compensation for having been induced to build on land of the company.

The Lord Chancellor, at p. 569, spoke of that contract being collateral to the purposes of incorporation of the company, but he said if the whole line of railway were built under a contract not under seal, and if the company refused to pay for the work for that cause, "it may be that the Court, acting on well recognized principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment."

A corporation for trading purposes may be a party to a bill of exchange, and sue or be sued upon it in assumpsit, by the common law: *Murray v. East India Co.*, 5 B. & Al. 204; *Crouch v. The Credit Foncier of England, Limited*, L. R. 8 Q. B. 374, 382.

The appointment by a corporation of a medical officer for any fixed period should be under the seal of the company: *Dyte v. St. Pancras Board of Guardians*, 27 L. T. N. S. 342.

The case of *The South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, S. C. in Ex. Ch. L. R. 4 C. P. 617, determines that whether a trading corporation can contract without seal or not depends not on the magnitude or the insignificance of the subject matter, but upon whether or not the contract be for a purpose connected with the objects of the incorporation. And that a company incorporated for working collieries which contracted for a pumping engine and machinery for that purpose, and paid part of the price, might sue for non delivery of the engine and machinery, although the contract was not under seal.

A multitude of cases are referred to and commented upon in the authority just mentioned. The rule is therefore indisputably settled as to trading corporations and other

corporations also as to matters essential to the purpose for which the corporation was established.

In *Henderson v. The Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409, a company incorporated for the purpose of trading as ship owners was sued on a contract not under seal, to pay remuneration in consideration of exertions to bring home a disabled vessel. Held, the corporation being a trading one, and the purpose being in furtherance of the incorporation, the company was bound, though the contract was not under seal.

In *Haigh v. The Guardians of North Bierley Union*, 8 B. & E. 873, a person employed by the defendants to investigate the accounts of one of their clerks was held entitled to recover, although the contract was not under seal, because it was work incidental to the purpose for which the guardians were created.

Nicholson v. The Guardians of the Bradfield Union, L. R. 1 Q. B. 620, was an action for coals supplied to the defendants and accepted by them. Held they were liable though the contract was not under seal, because they were supplied for the very purpose for which the defendants were incorporated.

The case of *Clark v. Cuckfield Union*, 21 L. J. Q. B. 349, 16 Jur. 686, is to the same effect, the consideration being executed.

In *Pim v. The Municipal Council of the County of Ontario*, 9 C. P. 304, in appeal, it was determined that the contractor, who had finished the gaol and court-house on a mere verbal agreement made with the defendants' architect, was entitled to recover for work and labour, as it was work the defendants were bound to do, and they had accepted it. The contract was completely executed.

An executory contract, not under seal, is not enforceable against a trading corporation: *Wingate v. Enniskillen Oil Refining Company*, 14 C. P. 379.

It is impossible, notwithstanding the clearness with which some of the moot points in corporation law have been established by several of the late decisions, not to

feel that there is still great difficulty in determining some of the questions on that branch of law which are constantly arising.

For instance, a company is incorporated to build a railway of many miles in length, and in which an enormous expenditure will be incurred; the whole work is done for and accepted by the company; there is no contract under seal. Can the contractor sue at law for the amount of his contract price or the balance of it, and it may be also for large demands for extras, or special remuneration, by reason of delays and obstructions to the work alleged to have been caused by the company?

If it be said the contract was not under seal and the company is not bound by it, it will be answered the company was incorporated for the express purpose of constructing the railway; it was not merely incidental to, but essential to their existence as a corporation that they should do such work; and therefore it may be done by any contract which they may choose to make, although not under seal.

In *Crampton v. The Varna R. W. Co.*, L. R. 7 Ch. App. 562, 569, before mentioned, the Lord Chancellor said, when such a case arose that the Court might say, acting on the well recognized principles of the Court of Equity, that the company would not be allowed to raise any difficulty of that kind as to the payment.

He does not say the law is clearly settled that in such a case the contractor could recover in the common law courts, although the contract was not under seal, because the work was done to accomplish the purpose of the incorporation of the company, and because the contract was executed, the company having accepted it.

But, still, according to the decisions already mentioned, he might have said so, because these decisions do say so. The magnitude of the transaction is of no consequence. The law is reversed in that respect. The question now is only whether "the contract was made for a purpose directly connected with the object of the incorporation": per Erle, J.,

in *Henderson v. Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 415. And in supporting that decision, *South of Ireland Colliery Company v. Waddle*, L. R. 4 C. P., at p. 618, Cockburn, C. J., spoke, in referring to the former law, as a "relic of barbarous antiquity."

And *Brown v. The Corporation of the Town of Belleville*, 30 U. C. R. 373, is expressly in point. There the defendants were held liable for dredging their harbour, although the contract was not under seal, because such a contract was within their power to make.

If the whole work were not done, it may be the corporation might dismiss the contractor from all further engagement, or stop the work entirely, and be excused from liability for doing so. That would be so at law. But would not a Court of Equity enforce the execution of a contract by the company under seal, if the work had proceeded so that the dismissal of the contractor would be ruinous to him, and the company were acting in the dismissal wrongfully and without any just cause or pretext?

It is difficult to see why that should not be ordered to be done, as in some of the cases cited with respect to land, where there has been part performance, or a good consideration, and a contract plainly proved, although not of a formal nature.

In this case the plaintiffs and defendants are municipal, not trading, corporations, and the Municipal Institutions Act of 1866, sec. 190, declares that "The powers of the Council shall be exercised by by-law when not otherwise authorized or provided for,"

And, by sec. 192, every by law must be under the seal of the corporation, and signed by the head of the corporation and by the Clerk.

And sec. 402 enacts, that the corporation of a city not separated for all purposes from the county may use the county gaol until the council of the city otherwise directs.

And, by sec. 405, the council of the city may erect and provide a gaol of its own. If that be done I have no doubt it must be declared and effected by by-law.

If the city have its own gaol, the council of the city would be bound to provide for the proper keeping of it. Sec. 405.

If, in the course of that imperative work, the city contracted, but not under seal, with certain persons to furnish provisions, fuel, clothing, and other necessities for the use of the prisoners, could the contractor recover the price of such articles from the city? In my opinion, according to the authorities, he could, because the articles would have been supplied, just as the coals in *Nicholson v. The Guardians of the Bradford Union*, L. R. 1 Q. B. 620, and as the water-closets in *Clark v. The Guardians of the Cuckfield Union*, 16 Jur. 686, were, "for a purpose connected with the objects of the incorporation."

If a recovery could be had in such a case by a contractor with the city for the supply of materials for the prisoners in the city gaol, why should not the like recovery be had by the county corporation against the city for articles furnished at the request of the city for the city prisoners, who are lodged and fed and warmed in the county gaol, where they are kept at the request of the city?

I do not see any difference between the two cases, excepting that in the one case a single person would be the plaintiff, and in the other a body corporate would be the plaintiffs.

But a corporation may sue on a contract not under seal, for non-repair by a tenant, or for rent, or for use and occupation: *The Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 162; *Fishmongers Co. v. Robertson*, 5 M. & G. 131, 192;

There are numerous cases collected in *Beverley v. The Lincoln Gas Light and Coke Co.*, 6 A. & E. 829. One of them was an action of assumpsit by a gas company for gas supplied to a customer, that being a contract which was made in the necessary course of the business of the company: *The City of London Gas-light and Coke Co. v. Nicholls*, 2 C. & P. 365.

If the articles supplied for the prisoners of the defendants were such as they are bound to pay for, it follows that the

plaintiffs must be entitled to recover their value, because they were bound to supply them to the prisoners in the first instance, and they were as much contracting within the limits of their statutory authority in furnishing the goods as the defendants were in agreeing to pay for them, although each corporation contracted by parol only.

I think this was never anticipated by the founder of our municipal system, and it does seem opposed to the provisions of the statute that the powers of the council are to be exercised by by-law when not otherwise authorized or provided for—that is, by an instrument under seal; and when the arbitrator, if there be an arbitrator, must be nominated by an instrument under seal.

The award, however, is not required to be under the seals of the arbitrators, but only in writing under their hands. An award, when sealed, is not a deed, and it would not be the deed of *the corporation* under any circumstances. Still, it may be urged, suppose the city had passed a by-law under their seal engaging to pay the county, they might revoke it, and if they did would the county from that time lose all recourse upon the city?

I think it would be far better if the *agreement* between the two corporations were by deed, or by a by-law under seal; but I must say from the legal decisions it was not absolutely necessary it should have been so. The *mutually agreeing* upon the compensation, by section 403, does not properly mean a by-law, for the two councils could not so agree by the same by-law, although each of them might agree by their own by-law.

The statute appears to refer to some other mode of agreeing than by a by-law. If that be got over, the difficulty is seriously diminished.

In my opinion the action may be maintained by the general law without a deed in a case like the present, and I think without a by-law also. A by-law merely because it is under seal is not a deed.

Crouch v. The Credit Foncier of England, Limited, L. R. 8 Q. B. 374, shews that a promissory note under seal is not a deed.

A by-law need not be sealed at common law. It is a mere rule, order or ordinance: *Grant* on Corporations 76, note (i).

A warrant though under seal is not a deed; nor an assignment of a bail-bond: *Leafe* v. *Box*, 1 Wils. 121; nor an award: *Brown* v. *Vawser*, 4 East 584; nor a recognizance, though it is of greater efficacy, 2 Bl. Com. 341.

Now if a by-law were made for the purpose it would not be pleaded or relied upon as a deed, and if a by-law had been passed I am clearly of opinion it would have been in every respect sufficient.

As to the first count, it is not open to the objection taken by way of exception to it, that it does not shew a deed; it is a matter of plea only. If a deed be necessary to be proved it must be assumed there was one. The fourth plea is rightly pleaded to the first count on that point, to raise the question as to the fact: *The Thames Iron Works and Shipbuilding Co.* v. *The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358.

As to the second or common count, the sixth plea is inappropriate. The common counts cannot be used when the claim is by virtue of a deed. The reason why the plaintiffs are obliged to state *for what it is* the defendants are indebted to them in so much money, as for goods sold and delivered, money lent, &c., is that the Court may see the plaintiffs are not suing for a claim not recoverable on the common counts, as for rent, or on a bond, or other deed.

There will be judgment on the demurrer to the fourth and sixth pleas for the plaintiffs—as against the fourth plea because the cause of action in the first count need not be one arising upon or by virtue of a deed; and as against the sixth plea, because the common counts cannot be founded upon a deed and the plea is idle and inappropriate, and also because the plaintiffs may recover on the common counts for the reasons which entitle them to recover on the first count, although the liability does not accrue by deed.

The plaintiffs are entitled for the same reason to recover, notwithstanding the exception to the declaration that the contracts are not shewn to have been made by deed.

As to the exception to the declaration, that the sum agreed upon to be paid by the defendants should have been an annual and fixed sum, and not a *pro ratâ* or fluctuating sum, I think it cannot prevail.

By the 12 Vic. ch 81, sec. 200, *an annual sum* was required to be settled upon in such a case, and the Court in *The Municipal Council of Middlesex and the Mayor, &c., of London*, 14 U. C. R. 334, determined that that meant there must be a definite, fixed, and ascertained amount agreed upon.

It is not very obvious that *an annual sum* means a *fixed sum*. The fact that the law has been altered in that respect is a strong argument that the Legislature did not concur in the construction which the Court had put upon that enactment.

We see no difficulty of any kind likely to arise from the two corporations agreeing that the compensation to be made shall be according to a determined ratable apportionment to be made between them of the expenses in question.

I think the declaration is free from exception for that cause.

There remains then only the seventh plea to be dealt with. That plea alleges that the plaintiffs' claim for compensation is made for the years 1867 to 1870, both inclusive, and which for each year fell due in these respective years: that the debt claimed was not an ordinary expenditure during these years; that no estimate was made by the defendants for the creation of such debts; nor was any by-law passed by the defendants for that purpose, nor for imposing any rate, over and above and in addition to all rates whatsoever, for the payment of the said debts.

That plea may be disposed of very shortly upon the same ground on which judgment was given in the *Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584, 595, as to those years for which a recovery was sought in that case for which no levy had been made, and for which no funds were applicable for payment of that demand—that is,

the difficulty or improbability of being able to procure or enforce payment by execution was no reason why the plaintiffs should not at all events recover a judgment. It might or might not at some time or other be available to the plaintiffs. A judgment of *assets quando* may prove to be of no kind of value to a plaintiff when he sues an executor, but he is nevertheless entitled to his judgment if he establish his cause of action.

According to *Scott v. The Corporation of the Town of Peterborough*, 19 U. C. R. 469, and *Cross v. The Corporation of the City of Ottawa*, 23 U. C. R. 288, the expense of the maintenance of prisoners may perhaps be said not to be "an ordinary expenditure," any more than the building of a bridge or the construction of a drain is so; but I shall refer to that.

The point was not considered in either of these cases, whether a formal recovery should not have been had against the corporations, although the judgment might not have been productive of any benefit to the plaintiffs.

The substantial point decided in these cases is, that ordinary expenditure must be provided for by the assets of the particular year to which that expenditure relates, and that debts falling due in one year cannot be paid out of rates levied in a subsequent year, even although a rate was imposed for the purpose of paying it in the proper year.

There may be a degree of strictness in the application of the law in some cases of the kind to which it may be difficult to subscribe. But the principles of these decisions have not been departed from in any subsequent case.

The matters to be determined are, firstly, was the demand of the plaintiffs an "ordinary expenditure" under sec. 227 of the Act of 1866. If it were, the defendants were empowered to raise it without the assent of the electors.

I think the very statement of the case shews that the support and maintenance of the prisoners must be an "*ordinary expenditure*," as much so as the salaries of the officers who have charge of them or of the magistrate who tried them, or the repairs of the building in which they are kept.

It is not possible that the assent of the electors can be required to be given to a by-law before money can be applied to the feeding and the care of prisoners. And if the city cannot apply money for that purpose without the assent of the electors, when the city prisoners are maintained in the county gaol, no more could the city appropriate money for that purpose if it had its own separate gaol and officers, nor could the county do so for either its own or the city prisoners in its charge.

There is an obligation on these municipalities beyond the assent of the electors—the necessity of the case. The danger to life forbids any election being given to the electors to say whether the prisoners shall be fed or not.

I say, without any hesitation, this is an ordinary expenditure of all municipalities having the care, custody, and maintenance of prisoners, within the meaning of that section of the act.

The plea then alleges there was no estimate made for these demands, nor any by-law passed nor rate imposed to pay it. None of these acts may have been necessary. There may have been other sources of income, for anything I know to the contrary, from which this demand might have been satisfied, and the plaintiffs allege that the defendants had in each of these years and still have sufficient money applicable to municipal purposes generally, and not specially appropriated to other purposes, which allegation the plea does not deny.

It really will be a matter of enquiry whether there were such moneys or not in each of these years. If there were, and they still remained on hand at the commencement of the suit, there is no reason why the plaintiffs' demand should not be paid from these assets; but if the moneys of 1867, from which payment of the claim for 1867 was not demanded or enforced, lay over until the action was brought, and in the meantime (the money not having been specially raised or appropriated for this particular purpose,) that general surplus was used for other purposes in 1868, or in subsequent years, and if the same happened with

respect to the other years also, it may be difficult for the plaintiffs to make the defendants replace that money from the present rates or resources of the municipality, because the rates or income of 1872, 1873, or 1874 belong to a different class and body of ratepayers from the class and body which were under the obligation to pay and should have paid: *Regina v. Read*, 13 Q. B. 524; *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 U. C. R. 584.

If there had been a special levy for the purpose or a special appropriation to it, the defendants could not apply it to any other purpose: sec. 235; *Southampton Dock Co. v. The Southampton Harbour and Pier Board*, L. R. 14 Eq. 595, L. R. 11 Eq. 254.

This last case is also an important authority that it was incumbent on the plaintiffs to have notified and demanded from the defendants at the end of every year the amount which they demanded, so as to enable the defendants to perform their numerous statutory obligations with respect to others.

The allegation in the first count that the defendants levied in each of the years, for the purposes of the said demand, divers sums of money out of which they ought to have satisfied the plaintiffs' demand is, I think, a sufficient averment that the demand was in each of these years specially provided for, and if so the fund could not rightfully be diverted to any other purpose.

The seventh plea, in alleging there was no by-law passed or rate made for the purpose, must have meant to traverse the above averment in the count.

But I think the plea, which alleges this demand was a debt which was not within the ordinary expenditure of the defendants during the said years, does not properly traverse the declaration, but asserts only that no by-law was passed, nor rate imposed, for the creation or payment of debts *beyond the ordinary expenditure*; and I have already said the demand is not beyond the ordinary expenditure.

The conclusion I have formed is, the declaration is free from the exceptions taken to it.

The fourth plea is bad. The contract in the first count is valid without a seal.

The sixth plea is bad, because it is pleaded to counts which necessarily admit or imply there was no seal; and because no seal was required from what appears in these counts, and especially as explained by the seventh plea.

The seventh plea is bad, because the debt is one of ordinary expenditure; and because the defendants have not denied they had moneys on hand applicable to the payment of this debt from other sources than a by-law or rate; and because the by-law and rate are pleaded only as to debts *not* of ordinary expenditure, and so it is not applicable to the declaration; and because also for anything which the plea shews the plaintiffs are entitled to judgment, although they may not be able to obtain the fruits of it.

There was an objection taken to the first count that the word, "*within*" was used in two places, instead of the word "*of*" according to section 402 of the Act. It is not right I should dispose of the case upon that ground. The defendants did not demur to the count for that cause, nor is it within their exceptions to it, and I therefore allow an amendment of the count, and pronounce judgment on demurrer generally for the plaintiffs.

Judgment for plaintiffs.

MELOCHE V. REAUME ET AL (a).

Replevin bond—Order setting it aside—Effect of.

An order of a Judge setting aside a writ of replevin "and all proceedings thereon, subsequent to the issue thereof," admitting that it extends to the replevin bond, does not of itself absolutely annul the bond, so that to an action on it such order can be pleaded as a defence.

The obligor in such case may obtain relief upon application to stay proceedings on the bond, or otherwise, on shewing that he is entitled to it, but the mere setting aside the writ of replevin by the defendant in that suit can be no reason why the bond should not be sued upon, for not prosecuting the suit with effect.

DEMURRER.

Declaration, on a replevin bond.

Plea : that after the replevying of the said goods, as in the declaration mentioned, the now plaintiff, being the defendant in the suit in the declaration mentioned, applied to a Judge of the Court in which the said suit was pending to set aside the said writ of replevin, and all proceedings thereon and subsequent to the issue of the said writ, and to prevent the plaintiffs therein, the now defendants, from further prosecuting their said action of replevin; and such proceedings were had upon such application, that afterwards, by the order of the Honourable Thomas Galt, one of the Judges of the Court of Common Pleas for the Province of Ontario, the said writ of replevin, and all proceedings thereon subsequent to the issue thereof, were set aside and annulled, whereby and by force of the said order the said bond became and was and is null and void, and the plaintiff was prevented from maintaining any action thereon.

Demurrer to the plea, on the grounds : 1. That it is not averred or shewn by the said plea that the bond in the declaration mentioned was annulled or set aside by the order referred to in the said plea.

2. It is not averred or shewn that the said bond was a proceeding on the said writ of replevin, or such a proceeding on the said writ as could be set aside by the said order.

3. The said plea neither traverses nor confesses and avoids the declaration, and is in other respects bad and insufficient. Joinder.

Osler, for the demurrer. The plea is bad for want of an allegation that the bond was set aside by the order. The allegation as to all proceedings "thereon," that is on the writ of replevin, does not include the bond, for the bond is not a proceeding. See Consol. Stat. U. C. ch. 29, sec. 8, and 23 Vic. ch. 45 sec. 3; *Welsh v. O'Brien*, 28 U. C. R. 405. It has been decided that a bond for security for costs is not a step in the cause. The case of special bail is different, because that is in fact an appearance, but bail to the sheriff is not a step in the cause.

C. Robinson, Q. C., contra. The bond is set aside by the order, for it is a proceeding in the cause. A fiat it is submitted would be a step in the cause. The Sheriff could not get on except for the bond. The writ is taken to him; the next step is to arrange for the bond; and then, but not before, he can proceed upon the writ. The word must be taken in its popular and ordinary sense. Let any one ask how the suit has gone on—what proceedings have been taken. He would certainly be told that the bond had been taken in answer to the question, and would intend to include it in his inquiry. It is therefore a proceeding.

WILSON, J.—Before the sheriff acts on the writ of replevin he must by the statutes take a bond from the plaintiff and sureties, and he must transmit with the return of the writ the names of the parties who give the bond, the names of the witnesses, the places of residence and additions of the sureties, and a description of the goods replevied.

The giving of the bond was subsequent to the issuing of the writ. Was it a proceeding thereon?

A *capias* which is issued pending a suit is a proceeding in the cause, because it has changed a suit which was begun by summons into one founded upon a *capias*: *Ball v. Stanley*, 6 M. & W. 396. The *capias* is nevertheless a

collateral proceeding and is not necessary towards obtaining a final judgment : *Ibid.*

The taxation of costs was held to be a proceeding in the cause : *Regina v. The London, Chatham, and Dover R. W. Co.*, L. R. 3 Q. B. 170.

The bail bond formerly given to the sheriff for the appearance of the defendant at the return of the writ was not a proceeding in the cause. It was vacated by a render of the defendant, or by his putting in special bail. It was sometimes ordered to stand as a security in the action, although special bail were put in, and taking an assignment of and proceeding upon it was equivalent to an election not to proceed in the original action.

It is very probable that the putting in of special bail, considering the many steps that have to be or might be taken before there was a final allowance of it, might be properly a proceeding in the cause.

Security for costs would not be, I conceive, a proceeding in the cause for all purposes—not such, I think, as to require a term's notice under the old practice to have been given—because it was purely collateral to the cause, and was in no way necessary for the obtaining of judgment.

The bond here taken in the original action was in one sense certainly a proceeding : that is, it was an act done and founded upon the writ which was issued, and which was necessary to be done before the goods could be replevied.

It may be conceded the order of the Judge in terms does apparently extend to the bond. The question rather is, had the Judge the power to set aside the bond or did he set it aside ?

I presume the Judge could have ordered the bond to be delivered up to be cancelled. That was the course invariably taken with respect to bail bonds. This bond was, as the former bail bonds were, taken by the sheriff in his own name. Does an order to set such a bond aside of itself avoid and annul it ?

The bond is still an outstanding subsisting instrument in form, and is in the possession of the plaintiff in this suit.

Upon the order of the Judge the Court could stay proceedings on the bond, and so give effect to the order as if the bond had in truth been delivered up and cancelled. But that has not been asked, and it has not been done.

The only question is, whether the order made to set aside the bond has absolutely annulled it? I think it has not in strict law.

In *Shep. Touch.*, 70, it is said, "But if an obligee deliver up an obligation to be cancelled, and the obligor do not afterwards cancel it but the obligee happens to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force at law, but the obligor would be relieved in equity." See also *Cross v. Powel*, Cro. Eliz. 483.

The strict law is not in favor of the defendant. It is better it should be so, for the defendant is plainly trying to apply the terms of the order to a proceeding the order was never intended to cover.

The present plaintiff never applied to set aside the bond, which was his only security for the goods which the defendants by the sheriff took away from him.

The defendants thus having got the property, claim they should be exempt from their bond, because, by inadvertence most likely, the order was drawn up to set aside the writ of replevin and all proceedings had thereon, when all that was intended, I presume, was that the writ, on account of some defect, should be set aside, but not that the bond should be set aside also, leaving the present defendants by the change of possession in the custody of the goods, without indemnity to the plaintiff for his having been wrongly deprived of them.

If the defendant have any claim to equitable relief he can apply for it by shewing what it is, and if he establish it he will get whatever protection he is entitled to.

The mere setting aside of the writ of replevin by the defendant in that suit can be no reason why the obligor should not be sued upon his bond for not prosecuting his suit with effect.

If the plaintiff in replevin sue out a void or irregular writ, the defendant cannot be precluded from having it set aside for that cause, because the plaintiff has given a bond to prosecute with effect and without delay; and if the defendant do get it set aside, he does not lose his right to sue on the bond because he has prevented the plaintiff from prosecuting with effect or without delay.

If that argument could be urged against the defendant in replevin in such a case, it could equally be urged against him at every stage of the cause. And the defendant would be precluded from demurring to a bad declaration, because, if he succeeded on the demurrer, he would be preventing the plaintiff from prosecuting with effect and without delay, because if the defendant had not demurred the plaintiff would have been enabled to press on with his suit and with effect.

So also the defendant would for the like cause be prevented from moving for a nonsuit, or to arrest the judgment, or even to plead a good plea in law. There can be no force in such an argument.

The case of *Welsh v. O'Brien*, 28 U. C. R. 405, is a good authority on that point, if it were required.

There will therefore be judgment for the plaintiff on demurrer.

Judgment for plaintiff.

FAIR V. PENGELLY. (a)

Principal and surety—Agreement to give time—Parol variation of written contract.

Declaration on defendant's bond for the performance by one H. of the covenants in a lease of land to H. from the plaintiff, alleging that H. thereby covenanted that he would by the 1st of March, 1873, divide a certain field on the premises by a rail fence into four fields of equal dimensions: breach, non-performance by H.

Equitable plea, that in the spring of 1872, H. in part performance of his covenant, erected a fence across the field, so as to divide it into two parts, and thereafter, while there was time for him wholly to perform his covenant, H. requested the plaintiff to extend the time for erecting the other fence until the 1st of March, 1874, which the plaintiff did verbally, before the time for performing the contract had elapsed, without the knowledge or consent of the defendant, and such extension remained unrevoked until after the time for performing the covenant had elapsed.

Held, on demurrer, plea bad, as shewing no binding agreement to give time, and setting up a new contract, not founded on any consideration, to contradict the written one.

DECLARATION:—That whereas, by indenture of demise, bearing date the 20th day of February, 1872, and made between the above-named plaintiff, of the first part, and one William Henry Hutchinson, of the second part, the said plaintiff demised certain lands therein described to the said W. H. H., to hold for five years, to be computed from the 1st day of March, 1872, at a rental of \$360 per annum, payable half-yearly. And whereas the said W. H. H., did thereby covenant to and with the said plaintiff, that he would, on or before the 1st day of March, 1873, divide the field on the said premises, called or known as the "big field," by good and sufficient rail fences into four fields of equal, or nearly equal, dimensions, by running one fence in one direction across the said field, and another at right angles therewith. * * * And the defendant, by his bond endorsed upon the said recited indenture became bound to the plaintiff in \$700, to be paid by the defendant to the plaintiff, subject to a condition, that if W. H. H. should pay the rents reserved by the said recited lease, and should perform, fulfil, and keep all and singular the

covenants, &c., in the said lease contained, and on the part of the said W. H. H. to be performed and kept, then the said bond should be void.

Second breach: that the said W. H. H. did not on or before the 1st day of March now last past, divide the field known or called as "the big field," on the said premises, by good and sufficient rail fences into four parts, by running one fence in one direction across the same, and another at right angles therewith, or at any other line.

Fourth plea to the second breach, on equitable grounds: that in or about the spring of the year 1872, the said W. H. H., in part performance of his covenant in that behalf, erected across the field known as the "big field" a good and sufficient fence, so as to divide the same into two parts, and thereafter, while there was yet time for him to wholly perform his said covenant, the said W. H. H. requested the plaintiff to extend the time for erecting the other fence, so as to divide the said field into four parts, until the 1st day of March, 1874; and thereupon the plaintiff, before the time for performance of the said covenant had elapsed, without the knowledge or consent of the defendant, verbally extended the time for erecting the said other fence until the said last mentioned day, and such extension of time by the plaintiff for the said W. H. H. remained unrevoked until after the time for performance of the said covenant had elapsed—whereby the defendant was and is released from the condition of the said bond in that behalf.

Demurrer to this plea, on the grounds: 1. The plea does not allege any covenant or agreement for such extension of time, nor does it appear that there was any consideration for such extension of time, but the same was merely a *nudum pactum*.

2. Notwithstanding what is alleged in such plea, the defendant could, upon satisfying the plaintiff, have enforced the covenant against Hutchinson.

3. There being other conditions of the covenant, in respect of which the plaintiff would be entitled to hold the judgment herein, the defendant would not be entitled to

an absolute unconditional and perpetual injunction against such judgment in a Court of Equity.

Joinder.

Hector Cameron, Q. C., for the demurrer. The question is, whether a mere verbal contract between the plaintiff and Hutchinson, without consideration, was binding on the plaintiff, so as to discharge the defendant as surety for Hutchinson from liability on his bond. *Tucker v. Laing*, 2 K. & J. 745, is expressly in point. The authorities shew that the contract with the principal must, in order to discharge the surety, be one that is founded on a good consideration: *Moss v. Hall*, 5 Ex. 46, 50; *Addison on Contracts*, 6th ed., 567; *Leake on Contracts*, 499; *Thompson v. McDonald*, 17 U. C. R. 304; *Corrigal v. Boulton*, 17 U. C. R. 131; *Simpson v. Kerr*, 33 U. C. R. 345, 350; *Taylor v. Manners*, L. R. 1 Ch. App. 48.

J. K. Kerr, contra. The principle of the cases cited is not disputed, but they are not applicable. If the surety's condition be altered in any manner by representations, whether his position be bettered or made worse, he will be discharged. The agreement was made with Hutchinson at a time when he could, but for the agreement, have performed his covenant. The agreement prevented his performing the work in due time. In such a case it would be unjust to resort to the surety: *Kerr on Injunctions*, 71; *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 45, 73; *Yeomans v. Williams*, L. R. 1 Eq. 184; *Wood v. Copper Miners Co.*, 17 C. B. 561; *McGinness v. Kennedy*, 29 U. C. R. 93; *Molson v. Bradburn*, 25 U. C. R. 457; *Erskine v. Adeane*, 21 W. R. 802, L. R. 8 Ch. App. 756; *Pooley v. Harradine*, 7 E. & B. 431; *Whitcher v. Hall*, 5 B. & C. 269; *Samuell v. Howarth*, 3 Mer. 272; *Calvert v. The London Dock Co.*, 2 Keen 638.

WILSON, J.—The following cases shew that time given, that is, forbearance to sue a person liable as debtor or contractor, will not discharge one who is liable for that other,

unless there is a binding agreement for the forbearance which precludes the creditor from prosecuting a suit.

The drawer of a bill of exchange is not discharged by time given on a mere voluntary engagement, without consideration, to the acceptor: *Moss v. Hall*, 5 Ex. 46. The same was held with respect to a joint maker of a promissory note, who was a surety for the co-maker: *Thompson v. McDonald*, 17 U. C. R. 304. The same as to a surety on a bond: *Corrigal v. Boulton*, 17 U. C. R. 131; *Tucker v. Laing*, 2 K. & J. 745.

Several of the cases cited do not apply, as there was a binding agreement between the parties. I refer to *Samuell v. Howarth*, 3 Mer. 272; *Whitcher v. Hall*, 5 B. & C. 269; *Pooley v. Harradine*, 7 E. & B. 431; *Taylor v. Mannors*, L. R. 1 Ch. App. 48.

The case of *McGinness v. Kennedy*, 29 U. C. R. 93, was where the agreement in question was collateral to the principal agreement, and supportable on that ground, as was also *Erskine v. Adeane*, 21 W. R. 802, L. R. 8 Ch. App. 756.

The only cases which require consideration are *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 45, and *Yeomans v. Williams*, L. R. 1 Eq. 18.

In the former case a marriage took place on the basis of a sum of £10,000 having been agreed to be left by the father of the lady in his will, subject to the terms of the marriage settlement. The father died without giving that sum by his will and the settlement did not mention it. But a letter having been written by the father after the marriage, admitting the terms of the written proposals agreed upon before the marriage, it was held to be a recognition of them, and the estate was held to be liable to make good the £10,000, with interest from one year after the father's death.

In the latter case, a mortgagee hearing that his son-in-law, the mortgagor, was about to sell the mortgaged property, a house which he occupied, in order to pay off the debt, wrote to the mortgagor that he might continue to

live there without paying rent. The mortgagor continued to occupy on those terms. It was held the mortgagor was entitled to redeem on paying the principal, with interest from the last day on which interest fell due previously to the death of the mortgagee, because the mortgagee might let his son-in-law live on the property, and say to him he might hold it rent free; that there was nothing contrary to equity in it; and that such conduct had induced the mortgagor to enter upon a certain course of action upon the faith of the representations that were held out to him, which he might not have entered upon but for those representations; and therefore the person making them ought to be bound to make them good.

In *Noble v. Ward*, L. R. 2 Ex. 135, in Ex. Ch., it was held, in accordance with *Moore v. Campbell*, 10 Ex. 323, that a contract required to be in writing by the Statute of Frauds, cannot be altered by a verbal agreement; and that the alteration did not imply a rescission of the former contract.

The plea demurred to is an equitable one, but the same rule prevails in equity as at law: *Erskine v. Adeane*, 21 W. R. 802, L. R. 8 Ch. App. 756; *Jervis v. Berridge*, L. R. 8 Ch. App. 351; *Clifford v. Turrell*, 1 Y. & C. C. 138.

I must therefore hold that the parol variation of time set up by the plea for the performance of the work in question is not a defence, because it is the setting up of a new contract to contradict the one in writing, not founded on any consideration whatever.

Judgment for plaintiff.

GOOCH v. SNARR (*a*).

Building contract—Construction of—Specifications not signed.

Declaration: that the defendant by indenture covenanted to do "all the work included in certain specifications" required for the erection of a building on Wellington street, in the city of Toronto, but did not perform the same. Plea, that by the indenture it is declared that the works to be performed were the works represented and specified in certain plans and specifications thereof prepared for said work and signed by one L., an architect, and the defendant, and that said works should in all things be performed according to said plans and specifications; and defendant says that no specifications of said work were prepared therefor and signed by said L. and the defendant, and by the want of such specifications the defendant was prevented from performing the works. Replication, that said plans and specifications were prepared for said work, as defendant, when he executed said indenture, well knew, and were the same specifications mentioned in the declaration, and the defendant was not, by the want of such specifications, prevented from performing said works.

Held, on demurrer, plea good, and replication bad; for that the specifications, signed by L. and by the defendant, were an essential part of the contract, and as they had not been signed the contract was not perfect.

DEMURRER. Declaration: that by indenture made on the 30th day of January, 1873, between the plaintiff and the defendant, the defendant covenanted to execute and perform all the work included in certain specifications for the mason, bricklayer, and stone-cutter's work, of every kind required in the erection and finishing of a building on Wellington Street, in the city of Toronto, for the sum of \$4,399, and to have the said buildings ready for the roof by the first day of June then next, and to have the said works completely finished by the first day of October then next. And all things happened, &c. Breach: that the defendant absolutely refused and neglected to perform the covenant, and the plaintiff was by reason of such refusal and neglect obliged to and did procure the said works to be executed by other persons, and was thereby put to great costs and expenses over and above the sum of \$4,399 aforesaid, and was greatly delayed in the progress and completion of the said building, and otherwise damnified.

Second plea: that in and by the said indenture it was and is declared that the works to be executed and performed by the defendant were the works represented and specified in certain plans and specifications thereof prepared for the said work, and signed by one Henry Langley, architect, and the defendant; and that the said indenture further declared that the said works should in all things be performed according to the said plans and specifications, after the manner therein set forth and explained. And the defendant says that on or before the said first day of June, or before the commencement of this suit, no specifications of the said work were prepared therefor, and signed by the said Henry Langley and the defendant; and by reason of the want of such specifications the defendant was prevented from executing and performing the said works.

Second replication to this plea: that the said plans and specifications in which the said works were represented and specified, and according to which the said works were to be performed, as in that plea mentioned, were prepared for the said work before and at the time of the making of the said indenture, as the defendant when he executed the said indenture well knew, and the said specifications were the same specifications in the declaration mentioned; and the defendant was not by reason of the want of such specifications prevented from executing and performing the said works as in the said plea alleged.

Demurrer to the replication, on the grounds, 1. that it is no answer to the plea: that it contains no material traversable averment; and that it is a departure from the declaration. Joinder.

The plaintiff excepted to the plea because: 1. The said plea does not answer the declaration, but admits the covenant declared on. 2. It is not alleged that the defendant was prevented from performing the said works by the omission of anything which it was the duty of the plaintiff to do. 3. The circumstance that the specifications in the plea mentioned were not signed by the defendant, is no answer to the declaration. 4. It is not shewn that

the defendant was prevented by the plaintiff from signing the specifications, nor that it was the plaintiff's duty to have procured the signature of the said Henry Langley thereto, nor that the signature of either the said Langley or the defendant was in any way material.

Robinson, Q. C., for the demurrer. The defendant was bound to do such work as the specifications signed by himself and the architect directed. Such specifications were never completed—that is, they were never signed—and there was therefore never any perfect contract made between the plaintiff and defendant. The plea is a full defence without any averment that the defendant was thereby prevented from executing the work, and this averment, which is the only averment answered by the replication, is of no consequence.

Patterson, Q. C., contra. The plea alleges that the defendant and Langley did not sign the specifications, that is, the two did not sign them. One of them may have done so. The defendant may have been that one, and he can not set up this defence as a reason for not going on with the contract. His signature to the specifications was dependent on himself alone, as he has stated no hindrance of any kind to his signing them. The specifications having been prepared before the indenture was executed, according to the replication, became a part of the contract, and the statement made as to their being signed, or to be signed, was a matter of description only, and not material.

Robinson, Q. C., in reply. The case for the defendant is that the signature of the specifications was material—a necessary part of the contract—and because it was never done, no contract was ever made.

WILSON, J.—The questions submitted for decision are whether the specifications were an integral part of the contract, and whether they had to be signed by the architect and by the defendant to make them binding and to perfect the contract.

The specifications were an essential portion of the contract. It is plain they were so, for the defendant was to do all the work "included in the specifications," and there is no other work specified which he was to do but what was contained therein.

The principal question was, whether these specifications were complete, and whether there was a complete contract between the parties until the architect and the defendant had signed the specifications. I must refer to the pleadings to determine that.

The declaration states that the defendant covenanted to do "all the work included in certain specifications."

The plea states that by the indenture it was declared the works to be executed were "the works represented and specified in certain plans and specifications thereof prepared for the said work, and signed by one Henry Langley, an architect, and the defendant," and that "no specifications of the said work were prepared therefor and signed by the said Henry Langley and the defendant."

And the replication states "that the said plans and specifications, in which the said works were represented and specified, * * were prepared for the said work before and at the time of the making of the said indenture, as the defendant, when he executed the said indenture, well knew."

Work required to be done *according to specifications*, may be done on a contract between the parties, although the specifications are not signed or sealed by the parties, if there be a valid contract independently of the specifications, and if they are mentioned only by way of reference. The specifications in such a case become a part of the contract: *Keele v. Wheeler*, 13 L. J. N. S., C. P., 170; *Llewellyn v. The Earl of Jersey*, 11 M. & W. 183; *Great Northern R. W. Co. v. Harrison*, 12 C. B. 576, Ex. Ch., per Parke, B., 602, 609; *Regina v. The Caledonia R. W. Co.*, 16 Q. B. 19.

The ordinary case of a contract being made out by different letters between the parties is an instance of a contract being made by reference and relation of one document to another.

There is nothing to shew that the specifications were attached to the indenture. There is no absolutely certain way of identifying them if those which are represented to be the specifications are not signed by the architect and the defendant. And it is evidence also that the signatures were required, and not having been attached the specifications were never perfected.

In *Wood v. Rowcliffe*, 6 Ex. 407, the generality of the conveyance of "all * * goods whatsoever * * in the house, more particularly mentioned in a schedule," &c., was limited by those goods which were specified in the schedule. There the schedule was "of even date herewith (the bill of sale), and given up to the said R. on the execution hereof."

The like rule was adopted as to land in *Barton v. Dawes*, 10 C. B. 261, and *Morell v. Fisher*, 4 Ex. 591.

That is not quite the point here. It is whether there has been a sufficiently full description given of the specifications under the statement that "they were prepared for the said work," so that the words "and signed by one Henry Langley and the defendant," may be rejected as surplusage, or as a false or needless demonstration.

If the specifications were attached to the deed they would be identified, and the only question would be whether they were fully executed.

Here the specifications appear to relate to "the mason, bricklayer, and stone-cutter's work of every kind required in the erection and finishing of a building on Wellington street, in the city of Toronto."

It does not appear the house was to be built for the plaintiff's own use, or for whose use; nor on the plaintiff's land, nor on whose land; nor that the specifications were dated, or made any reference to the indenture; so that upon their production there will be nothing to identify them as the specifications mentioned in the indenture.

I am disposed to think the specifications are not so fully described that they can be identified as the specifications referred to by the deed unless they are signed by the architect and by the defendant, and it is admitted on the pleadings that they were not so signed.

And I am also disposed to think that the provision as to signing the specifications was an important matter, expressly within the contemplation of the parties.

The only work which the defendant was to do was that which was contained in the specifications. They frequently contain also the times and terms of payment for the work, and other important matters; and it was of consequence that they should be signed by the defendant at any rate, and perhaps by the architect also, as the defendant was the person chiefly to be affected by them.

In *Myers v. Sarl*, 3 E. & E. 306, a sketch for extra work prepared by the plaintiff's architect, but not signed by him, was held not be "a direction in writing under the hand of the architect" within the meaning of the contract.

In *Williams v. Fitzmaurice*, 3 H. & N. 844, the specifications omitted all mention of the flooring. The plaintiff (the contractor) had signed a memorandum at the foot of the specifications in which it was stated he would do all the work in the foregoing particulars, "the house to be completed and fit for the defendant's occupation by the 1st of August, 1858." And it was held that as the work could not be completed without the floors, and as *the house* could not be fit for occupation without floors, the omission of the specific mention of flooring was of no consequence.

The specifications may be made of the essence of the contract, as where they state the work is to be "according to the plans and the quantities there given by the architect": *Kemp v. Rose*, 4 Jur. N. S. 919.

The specifications may be made as essential a matter of agreement as the schedule containing a list of the names of creditors in a deed of composition under the statute: *Buvelot v. Mills*, L. R. 1 Q. B. 104.

And when one considers how very strictly building contracts are construed, both at law and in equity, against the recovery by the builder for any work he may have done without the authority in writing of the architect to do so, when that writing is a preliminary requisite to his recovering, it is a reason for holding that the only document

which describes the work to be done, and which was required to be signed by the architect and the defendant, should have been signed according to the agreement.

I refer to *Scott v. The Corporation of Liverpool*, 5 Jur. N. S. 105, before the Lord Chancellor, where it is said "there is no equitable construction of an agreement distinct from its legal construction;" and to *Kirk v. The Guardians of the Poor of the Bromley Union*, 2 Phil. 640; *Kimberley v. Dick*, L. R. 13 Eq. 1; *Lamprell v. The Guardians of the Poor of the Billericay Union*, 3 Ex. 283; *Russell v. Viscount Sa Da Bandeira*, 13 C. B. N. S. 149.

The mere preparation of plans and specifications by an architect of the person for whom the building is to be erected, does not of itself make him the agent of that person, so as to make such person liable for the correctness of all that is stated in the specifications so prepared for tender. The builder or person tendering must examine and test the quantities and other particulars for himself: *Scrivener v. Pask*, 18 C. B. N. S. 785.

The purpose of the specifications is to found a tender upon, and they are not in general to be held to be altogether exact, although they may be so expressed as to be of the essence of the contract: *Kemp v. Rose*, 4 Jur. N. S. 919.

I have come to the conclusion, although not quite readily, that the plea does afford a good defence in law, and that the replication does not remove the defence which is pleaded. I am of opinion the specifications are here an essential part of the contract, and that they were required to be signed by the architect and by the defendant; and, as they have not been so signed, there has not been a perfect contract made between the plaintiff and the defendant.

I mentioned during the argument that the words in the plea, "and signed by one Henry Langley and the defendant," appeared to be used as if the indenture declared that the specifications had been so signed in fact, and that the defendant might be estopped by that declaration. The replication however (the plaintiff having pleaded over), I think in effect cures that, for while it asserts specifica-

tions were prepared, it does not assert they were signed; nor does it rely on the estoppel in any manner, nor make it an estoppel.

The allegation at the conclusion of the plea, that from the want of such specifications the defendant was prevented from executing the work, and the traverse of it in the replication, are not, I think, material on the ground on which I have felt bound to dispose of the case.

Judgment for defendant.

MACDONALD V. DICK. (a)

Negligence in erection of building—Action for—Liability of defendant—Pleading.

Declaration : that the defendant, an hotel keeper, and not a contractor or builder, was engaged in erecting a building, being an addition to an hotel, and employed one G. as architect of said building to furnish the plans, select the materials, employ men to erect the building, and generally to superintend the erection thereof for the defendant, and represent the defendant therein : that G., in pursuance of his duty and authority, employed one M. as sub-foreman in the erection of the building, and the plaintiff as a workman under him : that G. directed M. to remove some lumber to the upper floor, which the plaintiff, with other workmen under the defendant, was ordered by M. to do ; and the plaintiff, in pursuance of his employment was lawfully on the upper floor, the said floor having been constructed by the defendant and G. in the pursuance of his duty and employment as aforesaid, where, by the insufficiency of the beams supporting said floor—which insufficiency was known to the defendant though unknown to the plaintiff—and the negligence of G. and the defendant in the construction of said floor and building, the said floor gave way, and thereby plaintiff was injured.

Held, on demurrer, that the declaration shewed a good cause of action against defendant, for it must be taken to mean that the defendant had the building under his own care and supervision, so that what G. did was the act of the defendant only, and not the act of G. as a fellow-workman with the plaintiff.

Remarks as to the use of ambiguous language in pleading.

DEMURRER. Declaration. First count : that the defendant being an hotel keeper, and not a contractor or builder, was engaged in the erection of a building, being a wing or addition to the hotel known as the Queen's Hotel, in

(a) Heard before WILSON, J., alone. See note p. 575.

Toronto; and the defendant employed one Robert Grant as architect of the building to furnish the plans, select the materials necessary in its construction, employ men for the purpose of erecting the building, and generally to superintend the erection thereof for the defendant, and represent the defendant therein. And Grant, in pursuance of his duty and authority in that behalf, employed one William McBean as sub-foreman in the erection of the building, and the plaintiff as a workman under him. And Grant, in pursuance of his duty and authority in that behalf, directed McBean to remove a large quantity of lumber from the ground adjoining the building to the upper floor of the building; and the plaintiff, with other workmen under the defendant, was ordered by McBean, in pursuance of his authority aforesaid, to remove the lumber, and was in pursuance of the said orders and in the course of his duty engaged in doing so, and was lawfully and properly and in the course of his duty on the upper floor of the building, the said floor having been constructed by the defendant and Grant in pursuance of his duty and employment as aforesaid, when, by the insufficiency of the beams supporting the said floor—which insufficiency was known to the defendant, though wholly unknown to the plaintiff—and the carelessness and negligence of Grant and the defendant in the construction of the said floor and building, the said floor broke down and gave way, and thereby the plaintiff was thrown to the ground and his leg was broken, and he was permanently injured and rendered unfit for work, and incurred expense for medical attendance.

Demurrer: 1. Because it is not shewn the defendant was guilty of any negligence, or of such negligence or conduct as rendered him liable to the plaintiff for the alleged damage.

2. Because it appears the damages were occasioned by the conduct of Grant or McBean, but it is not alleged or shewn that Grant or McBean were incompetent or improper persons to be employed as it was alleged they were employed. Joinder.

In this term *J. K. Kerr* supported the demurrer. The declaration does not shew the defendant was the builder and the plaintiff his servant. The defendant did not order the plaintiff to do the act which it is said led to his being injured. The plaintiff was a fellow workman of those whose neglect it is said occasioned the injury. The authorities are strongly against the plaintiff: *Gallagher v. Piper*, 16 C. B. N. S. 669, 695; *Wigmore v. Jay*, 5 Ex. 354; *Wiggett v. Fox*, 11 Ex. 832; *Morgan v. The Vale of Neath R. W. Co.*, 5 B. & S. 570, 736; *Tarrant v. Webb*, 18 C. B. 797; *Feltham v. England*, L. R. 2 Q. B. 33; *Shearman & Redfield* on Negligence, 3rd ed., secs. 89, *et seq.*; *Addison* on Torts, 4th ed., 399.

S. R. Clarke, contra. The count shews that Grant represented the defendant; that the defendant was the principal, and that Grant and McBean were under him, and that they gave the order to the plaintiff; and as they did so the defendant is answerable for what they did and which occasioned damage to the plaintiff, because the defendant knew the defective condition of the floor and the plaintiff did not. Grant was employed as architect only, and not as the contractor for the work, except as representing the defendant. Grant was not a fellow workman with the plaintiff, but was the agent of the defendant. The defendant was in effect himself the builder: *Williams v. Clough*, 3 H. & N. 258; *Murphy v. Smith*, 19 C. B. N. S. 361.

J. K. Kerr, in reply, referred to *Gillson v. The North Grey R. W. Co.*, 33 U. C. R. 128.

WILSON, J.—All that I have to do, is to decide whether the first count discloses a legal cause of action against the defendant.

The count is drawn in such a manner that with the least possible committal in language against the plaintiff, there may be the largest possible inferences drawn against the defendant.

It is an effort to avoid alleging directly that the plaintiff

was the servant of the defendant, or that the defendant was personally carrying on the work of the building, and to avoid the admission by the plaintiff, or the effect of the admission, that he and those who were immediately concerned in the work were fellow servants in the same common employ, and under the same master, and to constitute a right of direct recourse upon the defendant.

As a fact I have no idea that such a case as has been stated in this count can or will be proved, and therefore my decision will not, if my opinion as to the facts be correct, affect the merits of the case one way or the other.

If the count shew a personal superintendence by the defendant of this work, or shew that Mr. Grant was not a servant of the defendant in the large and liberal meaning of the term, but the personal representative of the defendant, or his general agent, deputy master, general manager, or whatever other title descriptive of such a relation towards the defendant he may be described by, then the count will be sustained as a legal allegation of facts. If it do not it will be insufficient.

The allegation that the defendant was an hotel keeper, and was not a contractor or builder, and was engaged in the erection of the building in question, shews nothing more than that the defendant, being desirous of having a building put up for him was, as all such persons may properly be described to be, engaged in erecting this addition to the Queen's Hotel. In common language, the proprietor or person for whom a contractor is putting up a building speaks of himself, and is spoken of by others, as "building the house," because he is getting it built, although he may not be near the house, and although he may be utterly unfit for the actual work of it, as in this case it is represented the defendant was, by reason of his not being a contractor or builder, but only an hotel keeper.

The count then asserts that the defendant employed Robert Grant *as architect* to furnish the plans, select the materials, employ the men, and generally to superintend the erection thereof for the defendant, and represent the defendant therein.

That is a very extensive kind of architectural service. It is not often the case that the architect selects the materials, although he may do so within the proper sphere of his profession; but it must be a very unusual thing for the architect to employ the men for the work.

The services here described, excepting the furnishing of the plans and the superintendence of the erection, are those which belong to the contractor or the mechanical builder.

Such as they are, Mr. Grant was "to superintend the erection of the building for the defendant, and to represent the defendant therein."

That is the kind of language made use of that may mean one thing or another, which creates the doubt in ascertaining what is the actual legal position or character of Mr. Grant, the architect, towards the defendant, and in enabling it to be said whether the defendant has been or can be personally charged with the culpability complained of.

The count then proceeds, that Grant, in pursuance of his duty and authority, employed one William McBean as sub-foreman in the erection of the building, and the plaintiff as a workman under him; and Grant directed McBean to remove some lumber; and the plaintiff, "with other workmen under the said defendant" was ordered by McBean to remove the lumber; and while the plaintiff was doing so, the upper floor, to which the lumber had to be carried, by reason of the insufficiency of the beams supporting the floor, gave way, and the plaintiff was injured; that the upper floor had been constructed *by the defendant* and Grant "in pursuance of his duty and employment as aforesaid," and the insufficiency of the beams was known to the defendant, though not to the plaintiff; and the floor gave way by reason of the negligence of Grant *and the defendant*.

The whole of Grant's power, position, and character, is contained in the allegation that he was "generally to superintend the erection of the building and to represent the defendant therein."

The difficulty with me is that I cannot say the allegation, without any plea modifying or explaining it, does not mean that the defendant had the buildings in his own care and supervision, and that Mr. Grant, the architect, was merely the agent or representative, manager, or *alter ego* of the defendant, so that what Grant did was the act by agency of the defendant only, and not the act of Grant as a fellow workman with the plaintiff.

I think the allegation may bear that construction, particularly when read with some other parts of the count—for instance, that Grant *in pursuance of his authority and duty* employed the plaintiff; that the plaintiff, with other workmen *under the defendant*, was removing the lumber; that the floor was constructed *by the defendant and by Grant, in pursuance of his duty and employment*, and that *they* were guilty of negligence in constructing it; and that the *defendant* knew of the insufficiency of it while the plaintiff did not.

I refer to the cases of *Gallagher v. Piper*, 16 C. B. N. S. 669; *Murphy v. Smith*, 19 C. B. N. S. 361; *Feltham v. England*, L. R. 2 Q. B. 33, which were cited on the argument; and to the further cases of *Burgess v. Gray*, 1 C. B. 578; *Ormond v. Holland*, E. B. & E. 102; *Ashworth v. Stanwix*, 3 E. & E. 701; *Mellors v. Shaw*, 1 B. & S. 437; *Wilson v. Merry*, L. R. 1 Sc. App. 326.

This ambiguous method of pleading, so that it is embarrassing to understand what it is the pleader means, is not to be commended. There is no reason why the facts should not be plainly expressed, instead of words being used which may have been spoken by Judges in some of the cases relied upon, and which are sufficiently intelligible and accurate as an opinion read with the whole context of the case, but which cannot be adapted as descriptive of a legal right or liability, or proper to be incorporated in a pleading.

The plaintiff should either have used the common count alleging the defendant as the employer and the plaintiff as his workman, and have charged the neglect on the defendant directly; or if he did resort to a special count

he should have used language which plainly indicated the direct responsibility of the defendant, as by alleging that Grant "represented the defendant as his agent, and was not a mere workman of the defendant, nor a fellow workman with the plaintiff," or some such language, and there would have been no doubt about it.

In *Sheehy v. The Professional Life Assurance Co.*, 13 C.B. 787, 794, Maule, J., said that he could understand the use of a metaphorical expression of a judgment being recovered "behind the back of the defendant," used by a Judge in giving judgment, and added, "But have you any instance of it being used in a plea? It is not an uncommon thing to say that the plaintiff or defendant has not a leg to stand on; but I apprehend that sort of language would not do in pleading."

I feel, as before stated, that this demurrer really determines nothing substantial between the parties.

The real contest must be upon the facts, whether the legal effect of the first count can be proved.

There must be judgment on demurrer for the plaintiff.

Judgment for plaintiff.

ARMSTRONG V. LEWIN. (a)

Action on the case for conspiracy—Pleading.

Declaration: that the defendant and one L. did unlawfully and fraudulently combine, conspire, and agree together to defraud the plaintiff of \$100, and in pursuance and furtherance of said combination and conspiracy the said L. did procure and induce the plaintiff to lend him \$100 on his promissory note, and in pursuance and by means of such combination and agreement the said L. procured the said \$100 from the plaintiff, without any intention of re-paying the same, and with intent to defraud the plaintiff, whereby the plaintiff lost the said \$100.

Held insufficient, on demurrer, for not shewing what representations were made or means used, or what the facts were which constituted the alleged fraud or cause of action.

DEMURRER—Declaration: that the defendant and one James Davis Lewin, the younger, did unlawfully and

fraudulently combine, conspire, confederate, and agree together to defraud the plaintiff of the sum of \$100; and in pursuance of the said combination and conspiracy, and in furtherance of the same, the said James D. Lewin, the younger, did procure and induce the plaintiff to lend him the sum of \$100 on his promissory note; and in pursuance of such combination and agreement as aforesaid, and by means thereof, the said J. D. L., the younger, procured the said sum of \$100 as aforesaid from the plaintiff, without any intention of repaying the same, and with intent to defraud the plaintiff—whereby the plaintiff lost the said sum of \$100, and incurred expense in endeavouring to recover the same.

Demurrer, on the grounds that the declaration discloses no cause of action against the defendant, and shews no act or fraud on the part of the defendant which would render him liable to the plaintiff.

Joinder.

Lash, for the demurrer. Conspiracy may be prosecuted by the criminal law, although nothing be done under it, for it is the conspiracy which is the offence. But in a civil proceeding, the mere conspiracy will not give a cause of action; there must be an act done under it, and an injury resulting to the plaintiff from the act, to entitle him to sue: *O'Connell v. Reginam*, 11 Cl. & F. 155, 233, 9 Jur. 25, 30. If the indictment charge what is in itself an unlawful conspiracy, the overt act need not be shewn: *Rex v. Seward*, 1 A. & E. 706.

This count does not shew what was in itself an unlawful act. Getting money from another is not unlawful unless the means employed are illegal: *Rex v. Gill*, 2 B. & Al. 204. Nor does it shew how or by what means any injury was done to the plaintiff; or that any fraud was committed, or any unlawful act in pursuance of the conspiracy: *Regina v. Marsh*, 1 Den. C. C. 505. A general allegation of fraud is insufficient: *Regina v. Peck*, 9 A. & E. 686. Where false pretences are relied upon, they must be set out:

Rex v. Mason, 2 T. R. 581. Where inference is not sufficient, the charge must be set out certainly: *Regina v. Henshaw*, 1 Leigh & Cave, C. C. 444. See also *Rex v. Dale*, 7 C. & P. 352; B. & L. Prec., 3rd. ed. 333, as to fraud.

It was not shewn that the intent of J. D. Lewin, the younger, not to repay the money, was the fraud to be committed by means of the conspiracy. Although a plea of fraud may be general, it does not follow that a declaration for fraud may be as general. The declaration shews that J. D. Lewin, the younger, induced the plaintiff to lend him the \$100; it does not connect J. D. Lewin, the defendant, with that transaction.

S. R. Clarke, contra. The cases cited are all of a criminal nature, and do not apply. There is a conspiracy charged to defraud. It is then alleged that in pursuance of it, J. D. Lewin, the younger, procured the plaintiff to lend the money; and in pursuance of the conspiracy he procured the money, without any intention of repaying it, and with intent to defraud the plaintiff of it; and that shews sufficiently a fraud committed, and committed by means of the conspiracy, and so a good cause of action in the plaintiff: *The Municipality of the Township of East Nissouri v. Horseman et al.*, 16 U. C. R. 556; *Rex v. Gill*, 2 B. & Al. 204; *Rex v. Kinnersley*, 1 Str. 193; *Moriarty v. The London, Chatham, and Dover R. W. Co.*, L. R. 5 Q. B. 314.

WILSON, J.—In *O'Connell v. Regiam*, 9 Jur. 25, it is said by Tindal, C. J., at p. 30, "The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing, that is, to effect something in itself unlawful, or to effect by unlawful means something which may in itself be indifferent or even lawful."

In *Rex v. Turner*, 13 East 228, the indictment stated that the defendants conspired to go into a certain preserve for hares, belonging to T. G., without his leave and against his will, to take, snare, and carry away the hares in the preserve, and to procure divers bludgeons and other

offensive weapons, and to go to the preserve armed therewith for the purpose of opposing any person who should endeavour to apprehend or prevent them in and from carrying into execution the said purpose.

The indictment then alleged that the parties in pursuance of the conspiracy went to the preserve armed in that manner, and in pursuance of the conspiracy set snares for the purpose of taking the hares. The defendants were convicted. Judgment was arrested.

Lord Ellenborough asked during the argument, if the counsel for the Crown were prepared "to shew that two unqualified persons going out together by agreement to sport, is a public offence;" and in giving judgment, he said, at p. 231, "I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground—in other words, to commit a civil trespass—should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." The judgment was arrested.

In *Rex v. Seward*, 1 A. & E. 706, 713, Lord Denman said, "An indictment for conspiracy ought to shew, either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means."

The combination therefore to exonerate a parish from the burden of a poor person, and throw it on another parish, is not an indictable conspiracy. And the procuring of a marriage between two paupers, to effect that purpose, is not unlawful; the indictment not stating that the marriage was procured by any unlawful means or devices, or false pretences.

It is an indictable offence for persons to conspire, "by divers false pretences, and subtle means and devices, to obtain and acquire to themselves the moneys of another, and to cheat and defraud him thereof:" *Rex v. Gill*, 2 B. & Al. 204—without setting out the means and pretences by which the conspiracy was to be effected; because it is the conspiracy which is the offence, and the means of effecting it may not then have been determined upon.

A count for conspiracy to deceive and defraud divers of Her Majesty's subjects, who should bargain with defendants for the sale of goods, of great quantities of such goods without making payment or satisfaction for the same, with intent to make great profits thereby, without stating the means, is bad, as not shewing that the conspiracy was for a purpose necessarily criminal: *Regina v. Peck et al.*, 9 A. & E. 686; because the obtaining of goods without paying for them, is not necessarily a fraud. It might mean the obtaining goods to sell on commission.

This, however, is not properly an action of or writ of conspiracy, but an action on the case in the nature of a conspiracy. The plaintiff's ground of action is the damage he has sustained, and not the mere fact that a conspiracy had been formed against him: 1 *Saund.* 230, note (4); *Savile v. Roberts*, 1 Lord Raym. 374.

The allegation that one "did unlawfully attempt and endeavour fraudulently, falsely and unlawfully, to obtain from the Agriculturist Cattle Insurance Company a large sum of money, to wit, the sum of £22 10s., with intent thereby then and there to cheat and defraud the company," &c., is insufficient, because the nature of the attempt was not fully set forth: *Regina v. Marsh*, 1 Den. C. C., 505.

Formerly, the false pretences had to be stated—*Rex v. Mason*, 2 T. R. 581—because they were the matter which constituted the offence: per Holroyd, J., in *Rex v. Gill*, 2 B. & Al. 204, 206.

Trying the count under consideration by these decisions, can it be said that a combination to defraud the plaintiff of \$100, in pursuance of which one of the conspirators procured and induced the plaintiff to lend him \$100 on his promissory note, and in pursuance of which conspiracy, the conspirator obtained the money as aforesaid, without any intention of repaying it, and with intent to defraud the plaintiff—states a legal cause of action?

It is not an offence or wrong for two persons to combine to procure and induce a third person to lend one of the two persons \$100 on that person's promissory note

And the fact that the person did procure the money without the intention of repaying it, may have been no injury ; or his intention of not paying may have been of no consequence one way or the other, as the plaintiff may have taken his chance of that.

And that the money was so procured with intent to defraud may have been of no consequence either, as the plaintiff may have run his chance of that too.

The giving of the promissory note shews the party legally bound himself to pay the money. See *Rumsey v. The North Eastern R. W. Co.*, 32 L. J. C. P. 244.

The means by which that fraud was accomplished are not shewn. The two parties may not have perfected their course of procedure at the time they separated ; or it may have been agreed between them that the scheme was to be devised and carried out by J. D. Lewin, the younger. In either case, I presume the two were equally concerned.

Then, J. D. Lewin, the younger, sets to work, and what did he do ? In pursuance of the conspiracy, he procured and induced the plaintiff to lend him \$100.

The question immediately arises, by what means was that effected ; upon what story or pretext was the money got ; and how and in what respect were the means unlawful ; or was the story or pretext false or fraudulent ?

Was the plaintiff told anything which was untrue, with respect to the ability of the borrower to repay, or as to the purpose for which the money was to be applied ; or was he imposed upon by any trick practised upon him ; or did the borrower personate any other, and so get the money, and then give his own note for it ; or what did he do in pursuance of the conspiracy to defraud ?

The count just amounts to this : that in pursuance of a conspiracy to defraud the plaintiff of \$100, J. D. Lewin, the younger, did defraud the plaintiff of \$100.

It is not possible such a count can be sufficiently precise as descriptive of a wrong ; or as the statement of facts for judicial trial.

The Court does not know the facts to be able to say

whether they do or do not constitute a wrong. The Court cannot say the plaintiff was defrauded, unless it is told what was done, which the plaintiff calls a fraud; nor can the jury find the facts, for none are stated.

In the forms in B. & L. Prec., 3rd ed., 333-337, for causes of action based on fraud, which is really the nature and character of this action, the charge or manner of fraud is stated. As, by fraudulently warranting a horse to be sound, which the defendant knew to be unsound; by fraudulently representing a picture to have been painted by a particular artist; by falsely representing goods sold as corresponding with a certain sample, or that they were fit for a particular purpose; by fraudulently concealing a defect in a horse; by fraudulently representing that a third person might be trusted with goods on credit, &c.

All these are guides in such an action as the present, a mere action on the case for fraud, which causes damage to the plaintiff: 1 *Saund.* 230, note (4).

There must be judgment for the defendant on demurrer.

Judgment for defendant.

McKELVEY, Assignee of the Sheriff, v. HECTOR McLEAN,
the Younger, ET AL. (a).

Action on replevin bond—Set-off.

To an action on a replevin bond, by the assignee of the sheriff, a set-off forms a good legal defence, the penalty being considered as the debt.

To such an action defendants pleaded on equitable grounds, that the cordwood for which the replevin was brought and the bond given was claimed by M. (defendant in the replevin) and it was agreed between him and the plaintiff that M. should haul the wood from where it was cut to the river, and if M. could not prove that he was entitled to the wood the plaintiff should pay him for hauling and bankage of the same, which amounted to \$165.

Held, that this sum might be set off against the breach for non-return of the wood.

DEMURRER. Action on a replevin bond for 123 cords of

(a) Heard before WILSON, J., alone. See note on p. 575.

hickory wood, in the sum of \$650, subject to the ordinary condition, alleging as breaches of it:—

1. That McLean did not prosecute his suit with effect and without delay.

2. That he had not made a return of the goods.

3. That he did not pay the damages recovered by the plaintiff against him.

4. That he did not observe and perform all rules and orders made by the Court in the suit.

The second plea, pleaded on equitable grounds, stated that before the giving of the bond in the declaration mentioned the said 123 cords of wood were claimed by Hector McLean Jr., one of the defendants, and it was agreed between the plaintiff and the said H. McL. Jr., that the said H. McL. Jr., should haul and remove the same from the woods where it was cut to the Bank of the River Sydenham, and that if the said H. McL. Jr., could not prove that he was entitled to the said wood the plaintiff should pay him for hauling and removal and bankage of said wood, which amounted to \$165, and which the plaintiff has not paid; and the defendant H. McL. Jr., before the commencement of this suit, duly assigned by writing under his hand and seal to the other defendants thereto two undivided third parts of his above mentioned claim against the plaintiff, and of the hereinafter mentioned claims which the defendant H. McL., Jr., and the defendants, H. McL., Sr., and W. McL., as assignees as aforesaid, claim of the plaintiff; and the plaintiff before the commencement of this suit, and before the giving of the said bond, was, and still is, indebted to the defendant H. McL., Jr., and to the defendants H. McL., Sr., and W. McL., as assignees of the said H. McL., Jr. as aforesaid, in divers other large sums of money lent by the said H. McL., Jr., to the plaintiff for getting out said wood, amounting to the value of said wood, and for money payable by the plaintiff to the defendant H. McL. Jr., and to the defendants H. McL. Sr., and W. McL., as assignees, &c., for goods bargained and sold and delivered by the defendant H. McL., Jr., to the plaintiff before the giving of said

bond, and for money lent by H. McL., Jr., to the plaintiff, money paid, &c., &c., which claims are now due to defendant H. McL., the younger, and the other two defendants jointly, by the plaintiff, and are sufficient to pay the plaintiff's claim, and which the defendants are willing to set off against the plaintiff's claim.

Demurrer to the plea, because a set-off could not be pleaded to the plaintiff's cause of action.

John B. Read, in support of the demurrer. There can be no set-off to the breaches assigned. If it were intended to be pleaded to the third breach, it should have been so confined : *Cochrane v. Green*, 9 C. B. N. S. 448 ; B. & L. Prec., 3rd ed., 679-681.

Douglas, contra, referred to *Mayne on Damages*, 2nd ed., 94 ; *Hutchinson v. Sturges*, Willes, 261 ; *Lord Cawdor v. Lewis*, 1 Y. & C. 427, as authorities in support of the plea.

WILSON, J.—It is said that the mere existence of cross-demands is no reason why there should be a set-off of the one against the other allowed in equity : *Rawson v. Samuel*, 1 Cr. & Ph. 161 ; *Story's Eq. Jur.*, sec. 1436.

Such set-off is only allowed when the party seeking the benefit of it can shew some equitable ground for being protected against the adverse demand : *Ibid*.

Where one demand is legal and the other is equitable, and but for its being equitable a Court of law would have set it off as a legal demand, the Court of equity will allow the set-off to be made ; so also will the Courts of law now : *Clarke v. Cost*, 1 Cr. & Ph. 154 ; *Cochrane v. Green*, 9 C. B. N. S. 448.

The case of *Hutchinson v. Sturges*, Willes 261, was referred to as a case in point. That was an action by the officer of the King's household, who had taken a bail bond for the appearance of the party arrested. The defendant pleaded a set-off, which after the condition was set out was demurred to.

It was held that the bond, not being with a condition

for the payment of money, was not within the 8 Geo. II. ch. 24, and must be governed by the 2 Geo. II. ch. 22, if affected by it at all; but that the earlier Statute did not apply to such a case, because the Sheriff was suing on the bond as a trustee for the actual creditor, and if a set-off were allowed for the debt of the officer, all bail bonds might be defeated. It was also said that if the bail bond had been assigned to the creditor who sued upon it, a set-off against the creditor might have been pleaded, and then the penalty must be considered as the debt. The *penalty* was there to be considered as the debt—*Stephens v. Lofty*, 2 Barn. 338; 8 Vin. Abr. 562, pl. 33,—because the 8 Geo. II., ch. 24, did not apply to such a bond.

If this decision apply, and I see no reason why it should not, the plea, though pleaded as an equitable plea, is a good legal defence.

It seems almost absurd it should be so, for the defendants cannot in reality mean to treat the penalty as the true debt, and, admitting that against themselves, undertake to prove a counter claim equal to it at the least, as against the plaintiff, and upon their doing so to give the plaintiff the benefit of the whole sum in excess of his real demand up to the extent of the penalty.

I cannot say the plaintiff may not have a demand in fact to as large an amount as the penalty, and the defendants may be, as they profess to be, willing to admit that he is entitled to the full amount of it, and if so the case is right upon the merits.

But while I am constrained to say the defence is right in law, I feel very sure it is quite untrue on the merits.

In a case where there are no merits, the plea may do no harm, but defendants having a set-off in fact may by such a venturous style of pleading embarrass and prejudice themselves more than they bargained for, and if they do they must bear the consequences of attempting to force a set-off when one cannot properly or truthfully be pleaded.

In *Babbington* on Set-off, 36, and *Montagu* on Set-off, p. 13, the case in Willes is referred to as well decided. I see no reason to question the soundness of the decision.

Treating this as an equitable plea to the breaches assigned, I should have to decide against it without any question as to all the causes of set-off, excepting as to the first.

And as to that, it must be considered by itself. The plea alleges as to it, that the 123 cords of wood for which the bond was given were before the giving of the bond claimed by McLean, and it was agreed between him and the plaintiff that McLean should haul the wood from where it was cut to the banks of the river Sydenham, and if McLean could not prove he was entitled to the wood, the plaintiff should pay him for hauling and bankage of the same, and which amounted to \$165.

Taking this statement as confessing that McLean did not prove he was entitled to the wood, and is not entitled to it, then is it so intimately connected with the claim the plaintiff is making for a non-return of the wood that the defendants are entitled to have the \$165 deducted from the plaintiff's demand?

The cases of *Cawdor v. Lewis*, 1 Y. & C. 427; *Jones v. Moore*, 4 Y. & C., 351; *Maw v. Ulyatt*, 7 Jur. N. S. 1300; and *Beasley v. Darcy*, 2 Sch. & Lef. 403, note, are authorities for allowing the set-off, because the set-off grows out of and is connected with the claim made in respect of the cordwood.

The plaintiff by that assignment of breach claims the value of the wood, or damages for not returning it; and the defendants say the wood is enhanced in value by the work that McLean did upon it by hauling it from the woods to the bank, for which the plaintiffs were to pay him by their express agreement. Such a demand may fairly be deducted from the value of the wood.

Stimson v. Hall, 1 H. & N. 831, is not against the set off, because in that case the set-off, though connected with the original demand, was for unliquidated damages.

In *Cawdor v. Lewis*, 1 Y. & C. 427, a set-off was allowed against a demand in trespass for mesne profits, and a set-off for unliquidated damages for cutting timber which the

tenant had against the landlord was allowed to be set off against the landlord's rent, he claiming a forfeiture in respect of the non-payment of it. See *Beasley v. Darcy*, 2 Sch. & Lef. 403, note.

These cases warrant the allowance of so much of the set-off as against the breach for not returning the cordwood.

For the reason firstly given there must be a general judgment for the defendants on demurrer.

Judgment for defendants.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

ROBERT HAMILTON DENNISTOUN, JOHN HENRY METCALFE, JOHN HOWATT BELL, EDWARD HARRY DOUGLAS HALL, WILLIAM DRUMMOND HOGG, CHARLES EDGAR BARBER, KENNETH MCLEAN, EDWARD MEEK, WILLIAM McDONNELL, BURRITT EDWARDS, ALBERT ELSWOOD RICHARDS, HENRY ARTHUR REESOR.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 37 VICTORIA, TO EASTER TERM, 37 VICTORIA.

ACCIDENT.

See HIGHWAYS.

ACCORD AND SATISFACTION.

See SET-OFF.

ACTION.

On the case for Conspiracy.—*See* CONSPIRACY.

For obstructing drain directed to be opened by fence-viewers.—*See* FENCE-VIEWERS.

On the common counts, cannot be founded on a deed.—*See* MUNICIPAL CORPORATIONS.

For negligence in the use of machinery—Proof of negligence.—*See* NEGLIGENCE, 1.

AMENDMENT.

Semble, That it is not proper to allow amendments at the trial, which end, or must end, in a demurrer.—*Sheerman v. Toronto, Grey & Bruce R. W. Co.*, 451.

See MISJOINDER—MUNICIPAL CORPORATIONS.

APPEAL.

Under School Act.—*See* PUBLIC SCHOOLS.

APPROPRIATION.

Of Goods not delivered.—*See* SALE OF GOODS.

ARSON.

See INSURANCE, 6.

ASSAULT.

See CRIMINAL LAW.

ASSESSMENT AND TAXES.

Tax sale—Registration of Sheriff's deed—Evidence—Defects cured by Statutes.—In ejectment the plaintiff claimed under a tax sale made in 1839. The sheriff's deed was made on the 10th July, 1840. but not registered until the 18th July, 1861. The defendant claimed under the heir at law of the patentee, by deed dated the 18th of May, and registered on the 5th July, 1855, being the first deed registered upon the land.

Held, Wilson, J., diss., that the title being an unregistered one when the sheriff's deed was given, that deed did not then require registration to preserve its priority; that having been registered before the 29 Vic. ch. 24, sec. 57, repeated in 31 Vic. ch. 20, sec. 59, O., it was unnecessary to re-register under those Acts; and that the plaintiff's title must therefore prevail.

The sheriff's certificate on which the deed was registered, though dated 10th July, 1840, had written on it in the handwriting of R., who was sheriff in 1840, but had gone out of office before 1861, "Duplicate 1861," and in it the sheriff was described as Sheriff of the United Counties of N. & D., which were not united until 1850.

Held, that these informalities were insufficient to avoid the registration. Per Wilson, J., The Sheriff who had sold the land and made the deed was a competent person to give the certificate for registry, though out of office; and the registrar having acted upon it, though he might perhaps have refused to do so owing to its informality, the registration was good.

A book was produced dated 24th June, 1820, signed by the Surveyor General, containing a list of grantees and the lots granted, with the number of acres in each lot, in which this lot appeared, with the name of Elizabeth Hay opposite to it, and the letter D. opposite her name; and it was shewn that the lot was granted to her in 1817.

Held, sufficient evidence that the lot had been returned as described for patent, though there was no heading to the book, describing its subject or object.

Held, also, that this objection, and the objections that there was

no evidence that the taxes had been properly imposed by the Quarter Sessions, or of the sheriff's advertisements of sale, were under the evidence stated in the case, cured by the 32 Vic. ch. 36, sec. 155, O., and the 33 Vic. ch. 23, O.

'The plaintiff's right to a lien on the land under 33 Vic. ch. 23, O., and the mode of enforcing it, if the tax title had been invalid, remarked upon by Wilson, J. *Jones v. Cowden and Fraser*, 345.

ASSIGNMENT.

Of debts.—B. assigned to his partner and to himself, a debt due from the defendant to himself for goods sold, &c.,

Held, that under 29 Vic. ch. 28, and 35 Vic. ch. 12, O., B. and his partner could sue for this debt in their joint names. *Blair & Brockelbank v. Ellis*, 466.

Of Replevin Bond.—See REPLEVIN, 1.

See SET OFF.

ATTORNEYS.

Attorney acting without authority—Striking off Roll—Costs.—L. & A., partners, dissolved partnership, it being understood that L., should pay the debts, &c. There had been ill-feeling and litigation between them in which the attorney had acted for L. The attorney being authorized to act for R. W. & Co. creditors of L. & A. for a sum under \$500, applied to L. for information, as to other creditors of the firm, whose names he might use in order to put L. & A. in insolvency. L. told him to use the names of K. & L. of Rochester, U. S., stating that they would agree to what he, L., said. On the 3rd of May, 1873,

the attorney served a demand on A. in the names of R. W. & Co. and K. & D., requiring them to make an assignment in insolvency, and on the same day he wrote to K. & D. asking for their sanction. They made no answer; and A. having gone to Rochester and settled their claim, applied to set aside the demand. The attorney, thereupon abandoned the proceedings and paid A.'s costs. On a motion to strike the attorney off the rolls for this, on affidavits attributing his his conduct to malice.

Held, under the circumstances, which are more fully set out in the report, and malice being expressly denied, that the rule should be discharged; but as the attorney had been indiscreet, he was directed to pay the costs of the application. *In re an Attorney*, 246.

AUDIT.

Of Sheriff's account.]—See SHERIFF.

AWARD.

See FENCE VIEWERS,

BARRISTERS.

List of.]—277, 640.

BILL OF LADING.

See CARRIERS, 1.

BILLS AND NOTES.

Promissory note—Stamps—Affixing double duty—Payee a "subsequent party."]—*Held*, following *Wooley et al. v. Hutton et al.*, 33 U. C. R. 152, and dissenting from *Escott v. Escott*, 22 C. P. 305, that a payee is a "subsequent party" to a promis-

sory note, within the meaning of 31 Vic. ch. 9, sec. 12, who may pay the double duty provided by that section.

The plea was, that at the time of making the note, no adhesive stamp or stamps whatever were affixed to the note; to which the plaintiff replied that they paid double duty "by affixing to the note stamps to the amount of double duty payable in respect thereof."

Quære, whether the plea should not also have denied that the note was written on stamped paper; and *Seemle*, that the replication should have stated the amount in stamps affixed. *The Joseph Hall Manufacturing Co. v. Harnden et al.*, 8.

BOND.

Construction of.]—One M. and his sureties gave a bond to F., the plaintiff, reciting that F. had "appointed the above bounden M. his agent, to sell certain articles and things which the said F. is to manufacture and send to the said M. for that purpose, at and for the prices the said F. may put upon such articles and things in his instructions to said M, and has also appointed the said M. his agent to collect and receive all moneys arising out of such sales to the use of said F."

The condition then was "that if the above bounden M. shall in all things well and faithfully carry out the said agency on his part, and and shall well and truly make correct and faithful returns to the said F. of all moneys arising out of the sale of any of the articles or things aforesaid, and of all other moneys the said M. may at any time during the continuance of the said agency, collect for the said F., at the time and in the manner mentioned in the

instructions of said F., and agreed to by the said M. then," &c.

Held, that the words in italics did not refer only to such moneys as were to be derived from the proceeds of sales effected by M., and that upon default for other moneys than those arising from such sales collected by him, the sureties were liable to F. *Fleury v. Moore and McCarthy*, 319.

BONUS.

See RAILWAYS & R. W. COS., 1.

BREWERS.

License required by Brewers—31 Vic. ch. 8. D.—32 Vic. ch. 32, sec. 1, O.—33 Vic. ch. 2, sec. 1, O.]—

A brewer licensed as such by the Government of Canada, under 31 Vic. ch. 8, D., requires no license under the Tavern and Shop License Act of Ontario, 32 Vic. ch. 32, sec. 1, as amended by 33 Vic. ch. 28, for selling ale manufactured at his brewery.

The clause allows the selling by wholesale only, "in casks or vessels containing not less than five gallons each." *Quære*, whether a sale of more than five gallons put up in quart bottles, would contravene the Act. *Semble*, not, for that the object was to prevent sales of less than five gallons.

Whether the statute, if applicable to licensed brewers, would have been within the power of the Provincial Legislature, was a question raised, but not decided. *Regina v. Scott*, 20.

BRITISH NORTH AMERICA ACT.

See BREWERS—CARRIERS, 1—INSOLVENCY, 3.

BUILDING.

Negligence in Erection of.]—See NEGLIGENCE.

BUILDING CONTRACT.

Construction of--Specifications not signed.]—Declaration; that the defendant, by indenture, covenanted to do "all the work included in certain specifications" required for the erection of a building on Wellington street, in the city of Toronto, but did not perform the same. Plea, that by the indenture it is declared that the works to be performed were the works represented and specified in certain plans and specifications thereof prepared for said work and signed by one L., an architect, and the defendant, and that said works should in all things be performed according to said plans and specifications; and defendant says no specifications of said work were prepared therefor and signed by said L. and the defendant, and by the want of such specifications the defendant was prevented from performing the works. Replication, that said plans and specifications were prepared for said work, as defendant, when he executed said indenture, well knew, and were the same specifications mentioned in the declaration, and the defendant was not, by the want of specifications, prevented from performing said works.

Held, on demurrer, plea good, and replication bad; for that the specifications signed by L. and by the defendant were an essential part of the contract, and as they had not been signed the contract was not perfect. *Gooch v. Snarr*, 616.

BY-LAW.

Railway bonus, submission of to rate-payers.—See RAILWAYS & R. W. Cos., 1.

CARRIAGE BY WATER.

See CARRIERS, 1.

CARRIERS.

1. *Carriage by Water—Bill of Lading—Liability for storage and non-delivery at place specified*—33 Vic. ch. 19, O.]—The plaintiffs having purchased 100 tons of iron from B. L. & Co., in Montreal, it was delivered by B. L. & Co. to McC., the defendant's shipping agent, to be carried on a vessel of defendant's (Western Express Line) to Toronto, and a bill of lading was signed by a clerk of McC., which contained the stipulation, "to be landed at Beard's wharf." This delivery was also shewn in evidence apart from this document. The iron was actually shipped on the 8th of Oct., 1872, on the Dromedary, one of the same line, and the freight paid to McC. The iron, less half a ton, arrived at Toronto between 9 and 10 at night, and was delivered at Toronto, at at Milloy's wharf, some distance from the plaintiffs' wharf, on the 10th of October, and was taken away by plaintiffs. The defendant, who was on the vessel, said he sent first to the plaintiffs' wharf, who had no notice of its coming, but found no person there and no light, and therefore delivered it as stated. He denied any right in McC. to make a special bargain for freight or delivery and in McC.'s clerk to sign any bill of lading.

Held, that defendant having accepted the freight paid by reason

of the bargain with McC., could not deny McC.'s authority to make it.

Held, also, too late to object that the document was signed by McC.'s clerk, and not the master or purser, the master having accepted the cargo represented by it.

Held, also, that the consignees might properly sue in assumpsit for non-delivery of the goods, under the circumstances of this case, independently of the 33 Vic. ch. 19, O.

Held, also, that 33 Vic. ch. 19, O., was not beyond the powers of the Provincial Legislature, as being an interference with "Trade and Commerce," (B. N. A. Act, sec. 91, sub-sec. 2); and under this enactment the plaintiffs' right to sue was clear.

Held, also, that as the contract was to be performed in Ontario it was governed by the law of Ontario.

Held, also, that the plaintiffs were entitled to delivery at their own wharf, and that defendant's excuse for not delivering there was insufficient.

Held, also, that defendant was liable for the shortage in weight, though all put on the vessel was delivered, for it was shewn that the full quantity was delivered to McC., and it was not shewn that it had all been put on board the vessel.

The plaintiffs, therefore, were held entitled to recover for the shortage, and for the expense of carriage from Milloy's wharf to their own. *Beard et al. v. Steele*, 43.

2. *R. W. Co.—Duty and liability as Common Carriers.*—Defendants received 2000 bundles of hoop iron to be carried to London, and delivered at their station there to the

plaintiff. On its arrival, the plaintiffs having no agent in London and living in Montreal, defendants sent to them there advice notes of the arrival, and unloaded the iron in their yard, where it remained for nearly three weeks, and was injured by rust and exposure. *Held*, that the defendants as common carriers were not liable.

Eighteen bundles were missing, and defendants' officers, not having checked the number taken out of the cars, could only say that if the 2000 bundles arrived here it was placed in the yard, and must have been stolen from there. *Held*, that the defendants were liable for the eighteen bundles. *Hall et al. v. Grand Trunk R. W. Co.*, 517.

Connecting lines — Carriage of goods—Through rates.]—*See* RAILWAYS AND R. W. Cos., 2.

CASE.

See CONSPIRACY.

CHOSE IN ACTION.

Assignment of.]—*See* ASSIGNMENT—COVENANT FOR TITLE.

COMMISSION TO EXAMINE WITNESSES.

Execution abroad—34 Vic. ch. 14, O.]—*Held*, under 34 Vic. ch. 14, O., that the due taking of a commission, executed in Montreal, was sufficiently proved by an affidavit made before a notary public there, and not before the Mayor or Chief Magistrate, as required by Consol. Stat. U. C. ch. 32, sec. 21. *Beard et al. v. Steele*, 43.

COMMON CARRIERS.

See CARRIERS.

COMMON COUNTS.

Cannot be founded upon a deed.]—*See* MUNICIPAL CORPORATIONS.

CONSIDERATION.

See ESTOPPEL.

CONSPIRACY.

Action on the case for conspiracy —Pleading.]—Declaration: that the defendant and one L. did unlawfully and fraudulently combine, conspire, and agree together to defraud the plaintiff of \$100, and in pursuance and furtherance of said combination and conspiracy, the said L. did procure and induce the plaintiff to lend him \$100 on his promissory note, and in pursuance and by means of such combination and agreement the said L. procured the said \$100 from the plaintiff, without any intention of re-paying the same, and with intent to defraud the plaintiff, whereby the plaintiff lost the said \$100.

Held, insufficient, on demurrer for not shewing what representations were made or means used, or what the facts were which constituted the alleged fraud or cause of action. *Armstrong v. Lewin*, 629.

CONSTITUTIONAL LAW.

See BREWERS—CARRIERS, 1—INSOLVENCY, 3.

CONTINGENT INTEREST.

See WILL, 2.

CONTRACT.

1. *Notice of intention not to perform—Right to sue.*—Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue.

Declaration :—That the plaintiff agreed to sell and defendants to buy certain land in Oshawa, adjoining the lands of the plaintiff, which would be thereby enhanced in value to the plaintiff, for \$325, upon the following terms ; the money to be paid and the conveyances executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware ; and that in case he should not do this, he would, at the expiration of said eighteen months reconvey the land and receive back the purchase money. And all things happened and all times elapsed, &c., and plaintiff was ready to convey, yet defendant did not pay the plaintiff, nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c.

Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware on the said lot, and with the intention of procuring said land as a site for their factory in case this company should decide to erect it thereon ; that the plaintiff knew this when he made the agreement ; and before any demand by the plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave

notice thereof to the plaintiff, and that they would not require said land, and that the plaintiff was released ; and defendant did not otherwise abandon said agreement.

Held, following *Hochster v. De La Tour*, 2 E. & B. 678, that the declaration was good, and the plea no answer to it. *Dullea v. Taylor*, 12.

2. *Conveyance of land—Parol reservation of trees—Trespass by grantee for cutting them—Equitable plea.*—Declaration, *q. c. f.*, for cutting and removing trees, with a count in trover and the common counts.

Pleas, leave and license ; and a special equitable plea, setting up that the defendant being owner of the land, contracted by parol to sell it to the plaintiff, and that at the time of such contract and of the conveyance of the land by defendant, it was expressly agreed that defendant should have certain trees thereon, and be at liberty to cut and remove them, but that such reservation should not be, and it accordingly was not inserted in the conveyance ; and that the defendant entered and cut the trees, &c., which are the trespasses, &c., The defendant, as a witness at the trial, having proved the sale of the land, it was proposed to shew by him the agreement as set up in the equitable plea.

Held, that such evidence was improperly rejected, for that it was admissible both under the equitable plea and the plea of leave and license.

Semble, that the equitable plea shewed a good defence ; and that at all events, the plaintiff having taken issue upon it, the defendant was entitled to have the issue tried. *Walter v. Dexter*, 426.

See BOND—BUILDING CONTRACT
—RAILWAY AND R. W. Cos., 2
—SALE OF GOODS, 1.

CONTRACTOR.

Carriage of Railway contractors' workmen on train, liability of Company for injury to workmen.]—See RAILWAYS AND R. W. Cos., 4.

CONTRIBUTORY NEGLIGENCE.

See HIGHWAYS — NEGLIGENCE — RAILWAYS AND R. W. Cos., 3.

CONVICTION.

See LICENSE TO SELL LIQUOR—MAGISTRATES.

CORPORATE SEAL.

Power of corporation to contract without.]—See MUNICIPAL CORPORATIONS.

COSTS.

See ATTORNEY — COVENANTS FOR TITLE, 1.

COUNTY JUDGE.

Exclusive jurisdiction of, under sec. 50, Insolvent Act.]—See INSOLVENCY, 3.

COVENANTS FOR TITLE.

1. *Action on—Right to recover costs in Ejectment.*]—The plaintiff having been ejected by the heirs of H. L., sued under the covenant for quiet enjoyment in a deed from H. L., and under a covenant in a mortgage subsequently made by the plaintiff to H. L., by which the

plaintiff was to be undisturbed until default in the mortgage, and a verdict was rendered for the plaintiff with 1s. damages on the second count.

Held, that plaintiff was not entitled to increase these damages by the costs of the ejectment suit, for it appeared that the mortgage was not set up by the plaintiff in that suit, and if it had been he might have been successful in it. *Eccles v. Lowry*. 75.

2. *Covenants running with the land—Demurrer.*]—Declaration: First count, on the covenant for right to convey, is a deed of three lots of land by the defendant to plaintiffs, alleging that at the time of making the conveyance, defendant had granted one of the lots to S.

Second count, on the covenant for quiet possession in the same deed. Breach, that before making it, defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in Chancery, and foreclosed his mortgage, by which the plaintiffs lost this lot.

Third count, that defendant, being possessed of a lot of land, mortgaged it to one S. for £250 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee for \$22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land, and were put to costs, &c.

Fifth plea: to the first three counts, that before the alleged

breaches, the plaintiffs by deed conveyed all their estate in the land in those counts mentioned to one D., and they have not and had not at the commencement of this suit, got back or become seized of their former or any estate in said land, whereby the causes of action in those counts, could not and did not accrue to the plaintiffs.

On demurrer to these pleas, *held*, fifth plea, good as to the first count, but bad as to the second and third counts; for the plaintiffs, as those counts shewed, had only an equity of redemption, and the right to sue on the covenants would not pass with it to their assignee. *Burrows et al. v. DeBlaquiere*, 498.

CRIMINAL LAW.

Indictment for murder—Conviction for assault—32 & 33 Vic. ch. 29, sec. 51.]—On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vic. ch. 29, sec. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault.

Per Wilson, J., in this case there could have been no conviction for the assault, because the evidence upon the trial for murder shewed that it did not conduce to the death. *Regina v. Smith*, 552.

CROWN GRANT.

Evidence to explain.]—See DESCRIPTION OF LAND, 2.

DAMAGES.

Death from fall in defective pathway.]—In an action against a municipal corporation for the death

of one H., caused by defects in the highway, it appeared that the deceased was insolvent at the time of his death, and in failing health, not capable of much labour, but there was evidence that he was able to superintend his business, which was that of an innkeeper, and went to market. The jury having given \$4,000, apportioned among his children. *Held*, that the damages were excessive. *Hutton v. The Corporation of the Town of Windsor*, 487.

DECLARATION.

Form of in a qui tam action.]—See MAGISTRATES, 2.

DEED.

Delivery as escrow—Operation by relation back.]—Plaintiff was defendant's tenant of premises in Toronto, for which rent was in arrear to the amount of \$145.83. Defendant sold the premises to the Crown. The deed, dated the 23rd of October, 1872, was delivered by F., the agent at Toronto of the Minister of Justice, to M., the agent of the defendant, on the 15th of November, for execution. On the 16th it was executed, and was by M. handed to F. as an escrow, to become a deed when the money was paid. The deed was returned to F. on the 26th of November, and he registered it on the 29th, but the money was not paid till the 7th of December. Defendant having distrained on the plaintiff for the rent on the 29th of November.

Held, That the deed did not become operative from its original delivery by relation back, in which case defendant would have had no

reversionary interest at the time of the distress, but from the payment of the purchase money only. *Oliver v. Mowat*, 472.

By infant — Re-acknowledgment after he comes of age.]—See INFANT.
See DESCRIPTION OF LAND.

DEFAMATION.

Demurrer—Plea to words charged without the meaning.]—Declaration, That the plaintiff voted at a certain parliamentary election, and took the oath prescribed by section 41, of the Election Law of 1868, and that in reference to such oath, defendant falsely and maliciously spoke, &c., of the plaintiff. the words: "He swore to what was false, and I can prove it," meaning that the plaintiff was guilty of wilful and corrupt perjury.

Plea, to so much of the declaration as related to the speaking of the alleged words without the alleged meaning, that the plaintiff did swear false in swearing that he was a resident of a certain electoral division, and as such entitled to vote, &c.

Held, on demurrer, plea bad, because if it intended to specify perjury it should have distinctly charged that offence, and if not, the general issue should have been pleaded. *Strachan v. Barton*, 374.

DELAY.

In laying information under 32 Vic., ch. 32 O.]—See MAGISTRATES, 1.

DELIVERY OF GOODS.

See CARRIERS, 1—SALE OF GOODS, 1.

DEMURRER.

See PLEADING.

DESCRIPTION OF LAND.

1. *Mill site—Falsa demonstratio—Top of the bank.*]—On the 9th February, 1852, a patent issued to John Frost, under whom the plaintiff claimed, for a mill-site in Owen Sound, described by metes and bounds, by which, after going "one chain seventy links, more or less, to the top of the bank of the river," it proceeded "then south-easterly, along the top of the bank, to the limit between park lots, Nos. five and four; then southerly to the southerly limit of the town plot, or park lot No. one, keeping in all places at such a distance inland from the river as will allow of thirteen feet head of water being raised at the mill," &c. It then crossed the river "to a point to which the water will be backed by being raised thirteen feet, as before mentioned, at the mill, and then ran northwardly, eastwardly, and north-westwardly (being the general directions of the river) "keeping always, as on the other side of the river at such a distance inland therefrom as ensures to the mill owner the privilege of raising thirteen feet head water as aforesaid, to the place of beginning." A well defined bank of the river about thirty feet above the water extended from where the line first mentioned struck the top of the bank to the limit between lots four and five, and then the bank died away into flat.

Held, that under this patent the limit of the land granted was the top of the bank as far as the limit between park lots four and five, not

the line formed by the thirteen feet head of water. On the 14th of February, 1852, a patent issued to John Frost, (presumably the same person as the patentee of the mill site) for park lots four and five. The description of these lots by metes and bounds was in part, "commencing where a post had been planted in the northwest angle of park lot No. five, then north eighty-two degrees forty-five minutes east, nine chains thirty links, more or less, to the water's edge of the mill dam in the mill site block, in the said town aforesaid, by thirteen feet head of water being raised at the mill, then southerly following the water's edge thus formed," &c.

Held, that the first patent could not be controlled by the second; and the latter being to the first patentee, he thus acquired the whole land in dispute, and there was no reason why the description in his own deed, which was according to the first patent, should be qualified by the second. *Harrison v. Frost*, 110.

2. *Crown grants — Evidence to explain.*—In 1796 a patent issued to R. for 528 acres, more or less, "being composed of lots 16 and 17, front concession, 16 and 17 second concession, and 17 third concession, with the broken fronts of 16 and 17 on Burlington Bay, in the Township of Barton, butted and bounded as follows, beginning at the N. W. angle of lot 15 on Burlington Bay, thence S. 18° W. 115 chains, then N. 72° W. 21 chains; then S. 18° W. 51 chains; then N. 72° W. 20 chains; then N. 18° E. to Burlington Bay; then easterly along the bay to the place of beginning. Barton is on the south shore of Burlington Bay, and the lots number from the east. At the

west side of lot 15 the shore turns suddenly to the south, for some distance, so that the broken front of lots 16 and 17 are on a line with what to the eastward is the first concession, and these broken fronts contain together only 23 acres. In the description for this patent in the department the lots were called 16 and 17, "front or first concession."

The question was, whether lot 16, in the third concession proper, passed by this grant.

It was shewn that the government had never asserted any right to it; and the entries in books and plans in the Crown Lands Department shewed that it had always been assumed to have been granted to R. The descriptions for patent and the patents of the surrounding lots agreed with this view; the number of acres mentioned, 528, would not otherwise be covered by the grant; and R. and those claiming under him had held possession for more than 40 years. It was shewn also that the N.W. angle of lot 15, on the bay, was about 14 chains N. of the concession road in front of the second concession proper.

The defendant in ejectment, R.'s heir at law, contended that the description excluded this lot, so that the title was still in the Crown, and relied, among other things, upon certain old plans from the department, which the plaintiffs asserted to be incorrect.

Held, that the lot passed by the patent.

Remarks as to the nature of the evidence admissible,—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent.—*Juson et al. v. Reynolds*, 174.

DEVISE.

See WILL.

DOWER.

Equitable defence.—Per Wilson, J., that the equitable defence in ejectment in this cause, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to the possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements under a lease from her, fully set out in the report, and filed under “the Administration of Justice Act of 1873,” secs. 3 and 4, though probably not affording a good equitable defence, should be allowed.—*Carrick et al. v. Smith*, 389.

DRAINS.

See FENCE VIEWERS.

EJECTMENT.

Right to recover costs of.—See COVENANTS FOR TITLE, 1.

See WILL, 1, 2.

ELECTION COURT.

General Rules of.—291.

EQUITABLE DEFENCE.

In ejectment.—See LIEN, 2.

ESCROW.

See DEED.

ESTATE.

See WILL.

ESTOPPEL.

Agreement — Consideration for — Estoppel by a receipt under seal.—Action on the common counts, and on an agreement between the plaintiff and defendant, dated the 8th of April, 1873, by which, in consideration that the plaintiff would deliver to the defendant at Port Maitland, when requested, that portion of the rigging of the vessel *R. D.*, then on board the said vessel, the defendant would pay the plaintiff \$400. The defendant pleaded payment before action and release by deed.

At the trial this agreement was proved, and one of even date, under the plaintiff's hand and seal, by which the plaintiff sold to the defendant for \$800, the receipt whereof was acknowledged, the body and hull of the *R. D.*, and also his rights in a contract for stripping said vessel, and any payments due from the T. Insurance Co. for stripping said vessel, or from defendant for any work done under the contract to strip the vessel. It also appeared that the vessel having run upon a reef in Lake Erie, the plaintiff had been employed by the T. Insurance Co. to strip her and put the outfit in a place of safety, for which he was to receive \$250 and the hull. Defendant bought the outfit from the Insurance Co. for \$930 and the hull and rights under the stripping contract from the plaintiff for \$800. The defendant only paid the plaintiff \$400 on the agreement signed by the plaintiff, and gave him the agreement now sued on.

Held, that the plaintiff was not estopped by the receipt in the deed from shewing that the agreement sued on was part of the consideration for said deed, and that

the \$400 mentioned in said agreement was unpaid.—*Smith v. McCallum*, 479.

See CARRIERS, 1.—INFANT.—TRESPASS, 1.

EVICTIO.

See LANDLORD AND TENANT.

EVIDENCE.

Contradicting witness—Collateral issue.—See INSURANCE, 6.

Of return of land as patented by Surveyor General.—See ASSESSMENT OF TAXES.

Of parol reservation of trees on, conveyance of land.—See CONTRACT, 2.

Parol evidence to vary contract.—See PRINCIPAL AND SURETY.

See COMMISSION TO EXAMINE WITNESSES.—DESCRIPTION OF LAND, 2.—NEGLIGENCE, 1.—SHIP.

EXCESSIVE DAMAGES.

See DAMAGES.

EXECUTOR.

See SET-OFF.

FALSA DEMONSTRATIO.

See DESCRIPTION OF LAND, 1.

FENCE VIEWERS.

Award—Operation and effect of.—An award of fence viewers directing a drain to be constructed on one man's land for the benefit of the land of another, operates as the grant of an easement on the land through which it passes,

binding privies in the estate as well as parties; and so long as such award remains unchanged the rights of the parties and the nature of the easement must be governed by it.

An action therefore will lie against the owner of the land through which the drain passes for obstructing it to the injury of the person for whose benefit it is required.

Semble, that such person may enter upon the land and clear out the drain to the extent to which he is bound to maintain it under the award.—*Michael Kelly v. Patrick O'Grady*, 562.

FIRE INSURANCE.

See INSURANCE.

FOREIGN PRINCIPAL.

See SALE OF GOODS.

GIFT.

Gift inter vivos by parol—Acceptance.—In trover for a stump machine, it appeared that the plaintiff had worked on a farm for defendant, his uncle, since he was ten years old almost continuously until of age. Defendant had stated that he intended to give the machine to the plaintiff if he remained with him until he came of age, and the plaintiff swore that after he came of age defendant said "the machine was the plaintiff's" but he (defendant) wished the plaintiff to let him work it until he got the stumps out. The defendant denied this, and the machine had never been taken away by the plaintiff. It also appeared that when taxed with selling the machine, defendant said he was

about to sell his farm, and would then pay the plaintiff.

Held, that if the jury believed the plaintiff's account, there had been a complete gift *inter vivos*, and a verdict for the plaintiff was upheld. Actual delivery of the chattel is not necessary to such a gift; it is sufficient if the conduct of the parties shews that the ownership of the chattel has been changed.—*Viet v. Viet*, 104.

HARBOUR COMMISSIONERS OF TORONTO.

Toronto harbour—Sunken pier—Injury to vessel thereby—Liability of Harbour Commissioners.—*Held*, that the defendants, in whom the harbour of Toronto is vested by 13 & 14 Vic. ch. 80, were not liable to the plaintiff for an injury caused to his vessel by running against an old sunken pier at a point north of the windmill line, in the line of Church street produced, which street does not extend to the water; for such pier was not within the limits of the harbour as vested in defendants, and they had no power against the owner of the soil to remove it.—*Hood v. The Commissioners of the Harbour of Toronto*, 87. (This case has been appealed, and stands for judgment.)

HIGHWAYS.

Municipal corporations—Duty to repair sidewalks—Death arising from accident—Excessive damages—Contributory negligence.—*H.*, a man seventy years of age and feeble, was found at night lying beside an excavation for a drain under the sidewalk in defendants' street, where several boards had been

taken up and replaced with a temporary covering of boards laid at right angles to and projecting two inches above the rest of the sidewalk. He afterwards died from the effects of the fall. His administratrix sued the defendants, alleging that deceased *fell into the ditch*, which was open, and thus received the injury, while the defendants alleged that the ditch was securely covered, and that deceased had struck his foot against the projecting plank, and fallen.

Held, that upon the evidence, more fully set out below, the finding of the jury that he *fell into the ditch* owing to the insecure way in which the defendants left the opening, which was the only point left to the jury, was unsatisfactory.

The deceased was insolvent at the time of his death, and in failing health, not capable of much labour, but there was evidence that he was able to superintend his business, which was that of an innkeeper, and went to market. The jury having given \$4,000, apportioned among his children: *Held*, that the damages were excessive.

The deceased having passed over the place half an hour before, when it was light and the state of the sidewalk could be seen: *Held*, that there was evidence of contributory negligence on his part.

Remarks as to the nature of obstructions which would make the defendants liable, and the care required from persons with defective sight, &c.—*Hutton, executrix v. The Corporation of the Town of Windsor*, 487.

HOUSE, REMOVAL OF.

See TRESPASS, I.

IMPROVEMENTS.

Under 36 Vic ch. 22 O., lien for]
—See LIEN, 2.

INFANT.

Re-acknowledgment of deed by.]—W. M. came of age on the 27th August, 1857. On the 1st July previous, he executed a deed of certain premises to U., under whom defendant claimed, which was registered on the 26th of August. This deed was re-acknowledged between the 28th and 30th of August, and the re-acknowledgement registered on the 5th of September in the same year. On the 28th of August, a judgment was entered up against W. M. in favor of the plaintiff on a confession of judgment in assumpsit, signed the same day, and the plaintiff claimed through a sale by the sheriff upon a writ placed in the sheriff's hands on the 5th of October, 1857.

Held, that there had been a sufficient re-acknowledgement of the deed by the infant, that the confession of judgment was not *per se an act done* to avoid the deed.

Quære, whether the deed of W. M., an infant, unless legally avoided would operate by estoppel to pass the title to the land, as soon as the fee vested in him on obtaining his majority.—*Mc Coppin v. Mc Guire*, 157.

INFORMATION.

The commencement of a prosecution.]—See MAGISTRATES, 1.

INJUNCTION.

To restrain backing water.]—The defendant though forbidden by the plaintiff, went on with the erection of a dam which he had commenced

before the plaintiff purchased the adjoining land, and when completed it backed the water on to the plaintiff's land, and injured a timber slide which he had there, for which the plaintiff brought an action and recovered \$60. The Court granted an injunction to restrain the defendant from continuing the dam so as to pen back the water.—*McNab v. Taylor*, 524.

INSOLVENCY.

1. *Insolvent Act of 1864—Debts provable under—Covenants running with the land—Plea bad in part—Demurrer.]*—Declaration. First count, on the covenant for right to convey in a deed of three lots of land by defendant to plaintiffs, alleging that at the time of making the conveyance defendant had granted one of the lots to S. Second count: on the covenant for quiet possession in the same deed, Breach, that before making it, defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in Chancery and foreclosed his mortgage, by which the plaintiffs lost this lot. Third count: that defendant, being possessed of a lot of land, mortgaged it to one S. for £250 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee for \$22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land, and were put to costs, &c. Fourth count: common money count.

Fourth plea: that after the time when defendant is alleged to have become indebted and liable to the plaintiffs, and after the Insolvent Act of 1864, defendant made an assignment under it, and in his schedule the alleged claim of the plaintiffs, which was then, if they ever had any claim provable against defendant's estate, was included; and that afterwards defendant duly obtained an absolute discharge under said Act from the claims of his creditors, including the plaintiffs, which was duly confirmed, Fifth plea: To the first three counts; that before the alleged breaches, the plaintiffs by deed conveyed all their estate in the land in those counts mentioned to one D., and they have not and had not at the commencement of this suit got back or become seized of their former or any estate in said land, whereby the causes of action in those counts could not and did not accrue to the plaintiffs. On demurrer to these pleas:

Held, 1. Fourth plea bad, as to the first three counts; for the plaintiffs' claim under those counts could not have been proved against defendant's estate—not being for a debt due and payable, or due but not then payable, nor upon a contract dependent on a condition or contingency which had not happened before the first dividend, but for unliquidated damages—and the discharge therefore did not release it. 2. Fifth plea, good as to the first count, but bad as to the second and third counts; for the plaintiffs, as those counts shewed, had only an equity of redemption, and the right to sue on the covenants would not pass with it to their assignee. A plea bad in part is not necessarily bad altogether, but it may be held

on demurrer good as to some counts and bad as to others; and the pleas were so held in this case. The fourth plea was held not objectionable on demurrer, as not admitting and avoiding the plaintiff's claim, but referring to it as the plaintiff's alleged claim, if any.—*Burrowes et al. v. DeBlaquiere*, 498.

2. *Insolvent Act of 1869, sec. 90—Payment within thirty days—Action by assignee to recover back—Valuable security given up—Advance on credit.*]—Action by the assignee of B. & P., insolvents, to recover back \$190 paid by them to defendant within thirty days next before the assignment, they being then unable to meet their engagements in full, and defendants knowing such inability or having probable cause for believing it to exist.

Plea: on equitable grounds, that before the alleged payment, B. & P., being retail merchants, requested the defendant to lend to them for the purpose of carrying on their business, and he did lend, from time to time, various sums of money, upon the express agreement that such moneys should be repaid to defendant out of the proceeds of the daily sales of goods thereafter made by B. & P., and that such proceeds should be held by B. & P., upon trust to repay and should be charged with and applied in repaying the defendant the amount lent by him; and at the time of the payments in the declaration mentioned, the defendant was the creditor of B. & P., to an amount not less than such payments for moneys advanced upon the said express agreement, and the moneys paid to defendant by B. & P. were paid out of and formed part of the proceeds of said daily sales, and were paid by B. & P. and

applied by defendant upon and on account of the moneys advanced by defendant upon the said agreement, and not otherwise.

Held, on demurrer, Morrison, J., dissenting, reversing the judgment of the County Court, plea good; for that the agreement between B. & P. and defendant, gave defendant an equitable claim and mortgage on their goods which, under the proviso to sec. 90 of the Insolvent Act of 1869, was a "valuable security given up in consideration of such payment," and which must be restored to defendant before a return of the payment to him could be demanded, Morrison, J., was of opinion that the "valuable security," mentioned in sec. 90, must be a security recognized in law, which would prevail in the hands of a holder against any creditor, which the creditor when proving could shew and describe and value, and capable when so valued of being assigned and delivered to the assignee for the benefit of the estate; and that the equitable claim of defendant here was not such a security.—*Churcher v. Johnston* 528.

3. *Insolvent Act of 1869, sec. 50—Construction of.*—Declaration for entering a mill and taking and converting plaintiff's goods. Plea, in substance, that the plaintiff's claim to the goods and mill is only under a mortgage made by one W., who, before the grievances complained of made an assignment under the Insolvent Act of 1869, to defendant of all his estate and effects, including this mill and goods, subject to plaintiff's mortgage; that W. was then in possession of the premises, and such possession was transferred to defendant, who took possession as such assignee; and except as as-

signee defendant has in no way interfered with the mill or goods: that the plaintiff's alleged right of property can be determined by the County Judge; and that this Court has no jurisdiction to try the same.

Held, on demurrer, plea good, the plaintiff, under the facts stated, being restricted by sec. 50 of the Insolvent Act of 1869 to the remedy there given. *Held*, also, that that section was not beyond the power of the Dominion Parliament as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency.—*Crombie v. Jackson*, 575.

INSURANCE.

1. *Fire insurance—Further insurance by stranger—C. S. U. C., ch. 42, sec. 28.*—Sec. 23 of the Mutual Insurance Act, C. S. U. C. ch. 52, makes a policy voidable "if insurance on any house or building subsists in the Company and in any other office, or by any other person at the same time." without the consent of the Company; and it was a condition of the policy that further insurance by the plaintiff, or any other person, should render the policy void. *Held*, that the further insurance must be by the same person who has before insured, or in the same interest. *Gilchrist et al. v. The Gore District Mutual Fire Insurance Co.*, 15.

2. 29 *Vic. ch. 17, O.*—33 *Vic. ch. 21, O.*—*Life insurance—Right of action for insurance money.*—Defendants, by a policy dated 25th of August, 1870, insured the life of James Campbell for \$1000, to be paid at his death to the plaintiff

and two others, children of said James Campbell, and to his wife, if living, otherwise to the representatives and assignees of said wife and children. *Held*, under 29 Vic., ch. 17, and 33 Vic., ch. 21, O., that the plaintiff, on the death of James Campbell, might sue for his, the plaintiff's, one-fourth share separately, without joining the others interested in the policy.—*Campbell v. The National Life Insurance Co. of the United States of America*, 35.

3. *Magistrate's certificate of loss* — “*Concerned in the loss.*” — A fire policy on a saw mill and machinery therein required, in the event of loss, a certificate containing certain information “under the hand of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise,” &c. The magistrate who certified had leased the land on which the mill stood to the plaintiff for fifteen years, of which nine were unexpired. The mill insured by the defendant had been built by the plaintiff to replace one previously burned, and no rent was due at the time of the fire. There were no covenants on the part of the lessor to keep in repair, and there was a covenant on plaintiff's part to leave the mill in sufficient repair at the end of the term to saw 2000 feet in 12 hours; any machinery not required for this purpose to be removed by the plaintiff or paid for by the lessor. On a motion to set aside a verdict entered for the plaintiff in an action on the policy; *Morrison, J.*, was of opinion that the magistrate was not concerned in the loss, within the meaning of the condition. *Wilson, J.*, that he was.

The Court being equally divided the rule dropped. — *McRossie v. Provincial Insurance Co.*, 55.

4. *C. S. U. C. ch. 52—31 Vic., ch. 32, O.—Mutual Insurance—Assessment before policy—Liability for.* — An insurer with a mutual insurance company is not liable for assessment made before his insurance was effected, or premium note given. At the trial the learned Judge so ruled, and refused to allow defendants to plead a subsequent assessment made after the policy. The Court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. — *Green v. The Beaver and Toronto Mutual Fire Insurance Co.*, 78.

5. *Notice of mortgage posted, but not received.* — To an action on a fire policy, the defendant set up a condition endorsed on the policy, that any subsequent mortgage of the property insured “must be notified to the secretary in writing forthwith, otherwise the policy shall be void.” The plaintiff mortgaged part of the property insured to one McC., who mailed a letter to defendant's secretary, notifying him, as required by the condition, but the letter did not reach him. *Held*, that the mere posting, without shewing that it reached the secretary, was not a compliance with the condition. — *McCann v. The Waterloo County Mutual Fire Insurance Co.*, 376.

6. *Contradicting witness — Collateral issue — New trial.* — Action on a fire policy. Plaintiff was called as a witness, and said: “I did not tell E., defendant's agent, I had not been burned

out before. I was not asked by him." E. was called, and it was proposed to ask him questions to contradict the plaintiff on this point. *Held*, that such evidence was properly rejected, as raising a collateral issue. The case having been four times tried, the plaintiff having succeeded twice, and the jury having disagreed on the other occasions, and the defence being in the nature of a charge of arson, a new trial was refused.—*McCulloch v. The Gore District Mutual Fire Insurance Co.*, 384.

7. *Different classes of goods—Separate insurance on—Statement of loss.*—A policy of insurance on several different kinds of goods for separate amounts on each is, in effect, a separate policy on each class; and where such policy required the assured to deliver, "as particular an account of the loss and damage as the nature of the case would admit": *Held*, he must give such account of the loss on each class of goods, and that a statement of loss upon his stock or merchandise, generally, was not sufficient.—*Lindsay v. The Lancashire Fire Insurance Co.*, 440.

JOINT STOCK COMPANY.

Public Company—Payment of stock—Action by creditor against shareholder.—The plaintiff, a creditor of a company incorporated by letters patent, sued defendant, a shareholder, who pleaded that there was nothing due upon his stock. It appeared that there were nine shareholders, two of whom had a patent right under which the company were to work. The defendant held \$5000 stock on which he

had paid in cash \$4000. It was arranged between the patentees and the other shareholders, that the latter should pay an additional 10 per cent. on their stock, making 20 per cent., in consideration of which the patentees, who were said to have a large cash claim against the company for their patent right, were to pay up the balance of the unpaid stock of the seven shareholders, equal to \$28,000, out of this claim. In pursuance of this arrangement, each of the seven gave his check to the secretary for the balance of his unpaid stock, which the secretary passed on to the patentees, who accepted them and gave receipts to the company for the amount. The patentees then handed back the checks and receipts to the secretary, who returned the checks to the shareholders by whom they were given; it having been agreed beforehand that they were to be so returned, and not used. *Held*, that this transaction was not a payment in full of the stock, and that defendant was liable. *Scales et al v. Irwin*, 545.

JUDGMENT.

Registration, Priority of.—W. M., an infant came of age on the 27th August, 1857. On the 1st of July previous, he executed a deed of the premises in question to U., under whom defendant claimed which was registered on the 26th of August. This deed was re-acknowledged between the 28th and 30th of August, and the re-acknowledgment registered on the 5th of September in the same year. On the 28th of August, a judgment was entered up against W. M., in favor of the plaintiff on a confession of judgment in assumpsit, signed the

same day, and the plaintiff claimed through a sale by the sheriff upon a writ placed in the sheriff's hands on the 5th of October, 1857.

Held, following *Wales v. Bullock*, 10 C. P. 155, that the deed from W. M. being given before the teste of the *fi. fa.* lands, and delivery to sheriff, though after the registration of the judgment, was valid, and the sale by the sheriff under the execution passed no property to the purchaser. *McCoppin v. McGuire*, 157.

JUDGE'S ORDER.

See REPLEVIN, 2.

JUS TERTII.

See TRESPASS, 2.

LANDLORD AND TENANT.

Eviction.]—It appeared that the defendant, the landlord, having leased certain premises to the plaintiff, had rented the outside of the fence around the premises to one C. to post bills on, but the plaintiff claiming the fence, C. posted no bills, and only put up a notice forbidding others to post bills without his leave, which notice was pulled down. *Held*, no eviction. *Oliver v. Mowat*, 472.

LEAVE AND LICENSE.

See CONTRACT, 2.

LICENSE TO SELL LIQUOR.

32 Vic. ch. 32, secs. 22, 23, 24, O.
—Conviction for sale of liquor—Sale on Sunday—Sale without license—

Proof of second and third offence.]—

F. was convicted on the 5th of February, before W. R., a J. P., "for that he did on Sunday, the 19th of January, sell and receive pay for intoxicating liquor at his hotel," and was fined \$40 and costs, to be paid forthwith, and in default of distress to be imprisoned for 20 days at hard labour. On the 12th of February, F. was convicted before D. S. and J. L., two J. P.'s, for that he did, "on Sunday, the 26th of January, sell and receive pay for intoxicating liquors," &c., "the same being the third offence, &c., and was fined \$100 and costs, and in default of distress to be imprisoned for fifty days. A certificate of the first mentioned conviction, was before the magistrates on the second conviction. There was also evidence of the sale of liquor by defendant on three Sundays, but the informations did not allege the previous offence. It was not shewn whether defendant was licensed.

Held, that the first conviction was bad, for it did not shew whether it was for selling without a license, or having a license, for selling on Sunday; and if for selling without a license it was bad, because it awarded imprisonment at hard labour; and if for selling on Sunday, then because it was not alleged to be a second offence.

Held, also, that the second conviction was bad, because, if for selling without a license, the fine was beyond what the statute warrants, and if for selling on Sunday, it was not shewn or charged that defendant was licensed; and because the information did not charge the two previous offences. *Regina v. French*, 403.

See BREWERS.

LIEN.

1. *Under 33 Vic. ch. 23, O.*—The plaintiff's right to a lien on the land under 33 Vic. ch. 23, O., and the mode of enforcing it, if the tax title under which the plaintiff *bonâ fide* purchased had been invalid, remarked upon by Wilson, J. *Jones and Fraser v. Cowden*, 345.

2. *Equitable defence*—36 Vic. ch. 22, O.—*Lien for improvements.*—Per Wilson, J., that the equitable defence in ejectment in this cause, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements made under a lease from her, fully set out in the report and filed under "The administration of Justice Act of 1873," secs. 3 and 4, though probably not affording a good equitable defence, should be allowed.

Held, that a plaintiff may reply and demur to such an equitable defence. 36 Vic. ch. 22, as to improvements on land in mistake before notice, and the lien therefor, discussed. *Carrick et al. v. Smith*, 389.

LIFE ESTATE.

See WILL, 2.

LIFE INSURANCE.

See INSURANCE. 2.

LIMITATION, (STATUTE OF.)

See SET-OFF.

Of time for commencing prosecution.—*See MAGISTRATES*, 1.

LIQUOR.

See LICENSE TO SELL LIQUOR.

MACHINERY.

Accident from, Damages.—*See NEGLIGENCE*, 1.

MAGISTRATES.

1. 32 Vic. ch. 32, sec. 25, O.—*Conviction under—Commencement of prosecution.*—Laying the information is the commencement of a prosecution before a magistrate. Sec. 25 of 32 Vic., ch. 32, O., provides that "all prosecutions under this section shall be commenced within twenty days after the commission of the offence, or after the cause of action arose, and not afterwards." The information against defendant was taken on the 30th of December, 1872, laying the offence on the 16th of December. On the 15th of January, 1873, a summons was issued on the information, and on the 30th the defendant was tried and convicted. *Held*, that the prosecution was commenced in time. When the delay in proceeding after laying the information is great and the defendant seriously prejudiced thereby, he might perhaps obtain relief from the Court. *Regina v. Lennox*, 38.

2. *Omission to return conviction—Penal action for—Statutes—Form of declaration*—32-33 Vic. ch. 31, D.—33 Vic. ch. 27, D.—C. S. U. C. ch. 124—32 Vic. ch. 6, O.—*Construction of.*—Declaration, that defendant and W. C., then being two Justices of the Peace for, &c., on the 30th December, 1872, convicted the plaintiff and J. & D. of

an offence of which they stood charged by E. C., and adjudged each of them for the said offence to pay \$1, to be paid and applied according to law, and costs; and thereupon it became the duty of defendant and W. C., as such Justices, to make a joint return in writing of the said conviction, to the Clerk of the Peace for, &c., on or before the second Tuesday in March, 1873, according to the form of the Statute in such case made and provided, yet they did not, nor did either of them, as by the said Statute in that behalf required, make any return of the said conviction to the said Clerk of the Peace, on, &c., "contrary to the said Statute," whereby and "by force of the Statute in that behalf," the defendant forfeited \$80, and an action has accrued to the plaintiff, who sues for the same "under the said statute," to demand and have from the defendant the sum of \$80. *Held*, on demurrer, declaration bad, for it should have alleged defendant's neglect to have been contrary to the Statutes, not merely the Statute, there being two Statutes upon the subject, each requiring a different return. *Held*, also, that the plaintiff might sue for himself only, and need not sue *qui tam*. *Held*, also, that an action would lie against each magistrate for the penalty, for though in form in debt, the action was in fact *ex delicto*. *Quare*,—there being now some offences under the jurisdiction of the Dominion, and some under that of Ontario, and a different return required, and a different penalty imposed, as regard each class,—whether the declaration should not state the nature of the offence and that it was within the magistrate's jurisdiction, though formerly this

was not requisite.—*Drake qui tam v. Preston*, 257.

MAGISTRATES' CERTIFICATE.

Of loss under insurance policy.—*See* INSURANCE. 3.

MANDAMUS.

See RAILWAY AND R. W. COS., 1.

MASTER AND SERVANT.

See NEGLIGENCE, 2—RAILWAYS AND R. W. COS., 4.

MEMORANDA.

277, 640.

MISJOINDER.

C. L. P. Act, sec. 68—Misjoinder of defendants—Amendment at trial—Proof of ownership of vessel.—Defendant's vessel having got on the shore, the plaintiffs' vessel, the *Manitoba*, took off her passengers and freight and conveyed them to their destination, upon an order to do so signed by the purser of defendants' vessel. In an action for the services so rendered, the plaintiffs proved orally that the four defendants sued, owned the *Manitoba*. One of the defendants was then called, and swore that another defendant, W. B., Jr., had ceased to have any interest in the *Manitoba* when the services were rendered, though he was still a registered owner. The name of this defendant was then struck out. No certificate of registration was pro-

duced. *Held*, that under the C.L.P. Act, sec. 68, the amendment was authorized; and that the name of a defendant improperly joined may be struck out without his consent, and even against his express objection — *Lake Superior Navigation Co. v. Beatty et al.*, 201.

MISTAKE.

Action for money paid under mistake of fact.]—See MONEY PAID.

MONEY COUNTS.

See MONEY PAID—MUNICIPAL CORPORATIONS.

MONEY PAID.

Sale of goods to be selected—Money paid under mistake of fact—Right to recover back.]—Defendant sold by a bill of sale to the plaintiff his good will, lease, and certain druggist's stock thereafter to be selected, to the amount of \$5,700. One P. selected the stock from the stock list for the plaintiff who paid the \$5,700, and by some oversight a lot of lamp cleaners to the extent of \$173, were charged and paid for as part of the \$5,700, which, as the jury found, neither P. nor the plaintiff had ever chosen or accepted. Defendant having refused on application to take away these lamp cleaners, or repay the \$173—*Held*, reversing the judgment of the County Court, that, notwithstanding the bill of sale, the plaintiff was entitled to recover back the \$173 as money paid under a mistake of fact, and without consideration. —*Mingaye v. White*, 82.

MUNICIPAL CORPORATIONS.

Maintenance of city prisoners in county gaol—Agreement therefor—Municipal Act of 1866, sec. 401, et seq.—Necessity for corporate seal—Action—Pleading—Amendment.]—Declaration by a county against a city corporation, for compensation for the care and maintenance, by the plaintiffs, in the county gaol, of prisoners, under sec. 403 and following secs. of the Municipal Act of 1866, alleging an agreement made on the 6th June, 1867, by which, after deducting the amount paid from the Administration of Justice Fund, the balance of the expenses were to be paid equally by plaintiffs and defendants; that the sums payable for the food and clothing of the prisoners committed to said gaol by some competent authority in the city, during the years 1867 to 1870, inclusive, amounted to \$5,429, and, though defendants had paid part of it, and their half of the other expenses as agreed on, yet they had not paid the residue, although they had in each of said years sufficient money belonging to the city applicable to municipal purposes generally, and still hold moneys not specially appropriated to other purposes more than enough to meet plaintiffs' demand, and, although defendants levied in each of said years for the purposes of said demand moneys out of which they might and ought to have satisfied it. A common count was added for food furnished by plaintiffs at defendants' request to the prisoners sent to said gaol from defendants' municipality.

Defendants pleaded to each count that the alleged agreement was not

under their seal; and to the whole declaration that the claim under both counts was the same; and that said cause of action, if any, arose for a debt alleged to be incurred, and falling due during the said years, which was not within the ordinary expenditure of defendants during said years, and for which no estimate was made by defendants, nor any by-law passed for the creation of such debt, nor for imposing a special rate for payment of it.

On demurrer, *Held*, 1. That the first two pleas were bad, because the agreement was one which defendants might enter into without deed; and as to the second plea, because, also, the common counts cannot be founded upon a deed, and the plea was, therefore, inappropriate.

2. That the declaration was good: that it was unnecessary to allege defendants' contract to be by deed, and that it was not requisite that the sum payable should be a *fixed* annual amount.

3. That the last plea was bad: that the plaintiffs' inability to enforce payment was no reason why they should not recover a judgment; and that the claim for support and maintenance of the prisoners was within defendants' ordinary expenditure: that no estimate, by-law, or rate, might have been necessary, for there might have been other means for satisfying the demand; the averment that defendants had sufficient money applicable to general purposes, and not specially appropriated, was not denied; and the allegation that defendants levied in each year for the demand moneys out of which they should have paid it, was a sufficient averment that the demand

was, in each year, specially provided for, so that the fund could not rightfully be devoted to other purposes.

The first count referred in two places to prisoners committed to the gaol by competent authority, "within" instead of "of" the city, but this is not being a ground of demurrer an amendment was allowed, and judgment given for plaintiffs.—*The Corporation of the County of Wentworth v. the Corporation of the City of Hamilton*, 585.

See HIGHWAYS.—RAILWAYS AND R. W. COS., 1.—SHERIFF.

MURDER.

See CRIMINAL LAW.

MUTUAL INSURANCE.

Assessment before policy.]—See INSURANCE, 4.

NEGLIGENCE.

1. *Contradictory evidence—Non-suit—Dangerous machinery.*]—The plaintiff, a boy of twelve, in the employ of defendant, was left with two other boys to attend to a flax scutching machine. He had never attended to the machinery before, and he said that he received no instructions. The two boys were sent away, and the plaintiff, in attempting to replace a roller, which frequently came out of its place, had his arm crushed in some cog-wheels which were not covered. These wheels were on the opposite side of the machine from where the plaintiff was required to work, and the roller could readily have been replaced without going near them. The plaintiff further said that he put the roller

on as he had seen the boys do it, and that he had not been warned not to go near the cog-wheels. The defendant's evidence, on the other hand, shewed that the plaintiff had been distinctly warned; that the other boys had not replaced the roll on as plaintiff did; and that the plaintiff had been shewn how to put it in. It also appeared that the machine had been in use several years without an accident, although boys had constantly been employed about it.

Held, that there was evidence to go to the jury, if the plaintiff's statements were true, and a non-suit was set aside.—*Vicary v. Keith*, 212.

2. *In erection of building—Action for—Liability of defendant—Pleading.*]—Declaration: that the defendant, an hotel keeper, and not a contractor or builder, was engaged in erecting a building, being an addition to an hotel, and employed one G. as architect of said building to furnish the plans, select the materials, employ men to erect the building, and generally to superintend the erection thereof for the defendant, and represent the defendant therein: that G., in pursuance of his duty and authority, employed one M. as sub-foreman in the erection of the building, and the plaintiff as a workman under him: that G. directed M. to remove some lumber to the upper floor, which the plaintiff, with other workmen under the defendant, was ordered by M. to do; and the plaintiff, in pursuance of his employment was lawfully on the upper floor, the said floor having been constructed by the defendant and G. in the pursuance of his duty and employment as aforesaid,

where, by the insufficiency of the beams supporting said floor—which insufficiency was known to the defendant though unknown to the plaintiff—and the negligence of G. and the defendant in the construction of said floor and building, the said floor gave way, and thereby plaintiff was injured.

Held, on demurrer, that the declaration shewed a good cause of action against defendant, for it must be taken to mean that the defendant had the building under his own care and supervision, so that what G. did was the act of the defendant only, and not the act of G. as a fellow-workman with the plaintiff. Remarks as to the use of ambiguous language in pleading.—*Macdonald v. Dick*, 623.

NEW TRIAL.

Repeated trials—Arson.]—Where a case was four times tried, the plaintiff succeeding twice and the jury disagreeing on the other occasions, and the defence was in the nature of arson, a new trial was refused.—*McCulloch v. Gore District Mutual Fire Insurance Co.*, 384.

NONSUIT.

See NEGLIGENCE, 1.

NOTICE.

Of incumbrance to insurance Company, posted but not received.]—*See INSURANCE*, 5.

PAROL VARIATION OF CONTRACT.

See CONTRACT, 2. — *PRINCIPAL AND SURETY*.

PAYMENT.

Within thirty days of assignment.]
—See INSOLVENCY.

PENAL ACTION.

See MAGISTRATES, 2.

PENALTY.

Verdict for on replevin bond.]—
See REPLEVIN, 1.

PLEADING.

1. *Plea bad in part.]*—A plea bad in part is not necessarily bad altogether, but it may be held on demurrer good as to some counts and bad as to others; and the pleas were so held in this case. The fourth plea was held not objectionable on demurrer, as not admitting and avoiding the plaintiff's claim, but referring to it as the plaintiffs' alleged claim, if any.—*Burrowes et al. v. DeBlaquiere*. 498.

2. *Replying and demurring to equitable defence in ejectment.]*
—A plaintiff may reply and demur to an equitable defence in ejectment, under secs. 3 and 4 of the Administration of Justice Act of 1873.—*Carrick v. Smith*, 389.

See BUILDING CONTRACT—CONSPIRACY—CONTRACT, 1, 2—COVENANTS FOR TITLE, 2—DEFAMATION—INSOLVENCY, 1—MAGISTRATES, 2—MISJOINDER—MUNICIPAL CORPORATIONS—NEGLIGENCE, 2—RAILWAYS AND RAILWAY COMPANIES—REPLEVIN, 2—SET-OFF—TRESPASS, 1.

POSSESSION.

See TRESPASS, 2.

POSTING BILLS.

See LANDLORD AND TENANT.

POST OFFICE.

Notice posted but not received—Effect of.]—See INSURANCE, 5.

PRINCIPAL AND AGENT.

See BOND—SALE OF GOODS, 2.

PRINCIPAL AND SURETY.

Agreement to give time—Parol variation of written contract.]—Declaration on defendant's bond for the performance by one H. of the covenants in a lease of land to H. from the plaintiff, alleging that H. thereby covenanted that he would by the 1st March, 1873, divide a certain field on the premises by a rail fence into four fields of equal dimensions: breach, non-performance by H.

Equitable plea, that in the spring of 1872, H. in part performance of his covenant, erected a fence across the field, so as to divide it into two parts, and thereafter, while there was time for him wholly to perform his covenant, H. requested the plaintiff to extend the time for erecting the other fence until the 1st of March, 1874, which the plaintiff did verbally, before the time for performing the contract had elapsed, without the knowledge or consent of the defendant, and such extension remained unrevoked until after the time for performing the contract had elapsed.

Held, on demurrer, plea bad, as shewing no binding agreement to give time, and setting up a new contract, not founded on any consideration, to contradict the written one.—*Fair v. Pengelly*, 611.

PRISONERS.

Maintenance of, in county gaol—Action by county against city therefor.]—See MUNICIPAL CORPORATIONS.

“PROCEEDING.”

In an action, what is.]—See REPLEVIN, 2.

PROMISSORY NOTE.

See BILLS AND NOTES.

PROSECUTION.

Commencement of.—Laying the information is the commencement of a prosecution before a magistrate.—*Regina v. Lennox, 28.*

PUBLIC COMPANIES.

See JOINT STOCK COMPANY.

PUBLIC SCHOOLS.

Union of school sections—Right of appeal under 34 Vic. ch. 33, sec. 16, O.—Statutes, construction of—Retrospective effect.]—By 34 Vic. ch. 33, s. 16, “the majority of the trustees or any five rate payers of a school section, shall have the right of appeal or complaint to their County Council against any by-law or resolution which has been passed or may be passed by their Township Council for the formation or alteration of their school section,” &c. In 1858, two school sections in a township were united by by-law, pursuant to 13 & 14, ch. 48, sec. 8. and, remained so, the old separate school houses having been sold and a new one built, &c., until January, 1873, when a petition was presented under 34 Vic. above cited, to the County Council for the disallow-

ance of said by-law, and the matter was referred to a committee, as directed by that statute, which disallowed the by-law of 1858. The Township Council thereupon passed a by-law, among other things, to raise \$270 by a rate on one of the original sections for public school purposes in said section. Held, that such petition and subsequent proceedings were not authorized by the 34 Vic. ch. 33, s. 16, under the circumstances set out; and that the by-law being based on their validity, must be quashed.

Semble, that the section could not be held to be so far retrospective as to authorize the appeal from and disallowance of the by-law uniting the sections, after it had been for so many years passed and acted upon.

Quere, whether the words in the section, “for the formation or alteration of their school section,” include a by-law for the union of school sections.

Held, that the right of appeal was given by the section only to persons who were trustees or rate-payers of the section when or after the statute came into force.

Semble, also, that there could be no right of appeal here, for the petition admitted that the union complained of was desirable when formed in 1858, but alleged that it had ceased to be so, owing to a change in circumstances.—*Re Proper and the Corporation of the Township of Oakland, 266.*

RAILWAYS AND RAILWAY COMPANIES.

1. 34 Vic. ch. 43—35 Vic. ch. 60—*R. W. bonus—Mandamus to submit by-law—Demand and refusal.]—Before the Court will grant a*

mandamus to a Municipal Corporation to pass or submit a by-law to the electors granting a railway bonus, a distinct demand upon and refusal by the corporation to pass or submit the by-law must be shewn.

P., a member of defendants' Council, presented a petition for a by-law granting such a bonus, on the 20th of June, and on the 21st the committee to which it was referred reported favourably, adding that they had a legal opinion going to shew that it was imperative on them to submit the by-law. The Council refused to adopt this report and on the same day P. moved that a by-law in accordance with the petition be then read a first time, which was lost, but it did not appear that the by-law was drawn up or presented to the Council, and it was not before the Court. On the 25th P. applied for a mandamus.

Held, not a sufficient demand and refusal; for the Council were not bound to adopt the report or assent to the legal opinion embodied in it, or to pass the motion for the first reading of a by-law not before them and they were entitled to some time to consider the nature of the by-law they were required to pass and submit; and *Semble*, they should have had reasonable notice of the intention to make this application.—*Re Peck and the Corporation of the County of Peterborough*, 129.

2. *Carriers — Connecting lines—Contract—Through rate.*]—Plaintiffs bought 24 bales of cotton in Cincinnati, through their agent B., who delivered it there to the C. H. & D. R. W. Co. The bill of lading contained a heading "contract for a through rate." Under the general heading of the C. H. & D. R. W. Co.,

it stated that the cotton was forwarded by B., and that the shipping marks were: "G & M.—for Gordon, Mackay & Co., Thorold, Ont., via Detroit & G. W. R.," and in the margin were added the words, "Through at 40c. per 100 lbs., &c., to Detroit via——." The cotton was delivered without instructions to defendants at Detroit, by the teamster of a line connecting with the C. H. & D. R. W. Co., and was burned while in transit on defendants' line to Thorold,

Held, that the bill of lading shewed a contract with the C. H. & D. R. W. Co. for a through rate to Thorold, and therefore that defendants were not liable to the plaintiffs.—*Gordon et al. v. Great Western Railway Co.*—324.

3. *Want of care in crossing—Contributory negligence.*]—It is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is contributory negligence.

In this case, the plaintiff having approached and attempted to cross the track at a trot, and without looking out, though he could have seen along the line in either direction for some distance. *Held*, that he could not recover for an injury sustained by collision with defendants' train, and a nonsuit was ordered.

It was urged that the evidence set out in the report disclosed negligence on the part of the defendants in allowing cars to be on a siding, obstructing the view while the train was passing: but *Semble* that it did not.—*Johnston v. Northern Railroad Co.*, 432.

4. *Carriage of contractor's workmen on gravel train—Liability of*

R. W. Co.—Amendment at trial—Demurrer.—Declaration: That I. S. (husband of the plaintiff) was a servant and workman employed by certain contractors with defendants in ballasting defendants' railway, and in performing such work certain cars and engines under the guidance and management of defendants' servants were used for the transport of materials and the conveyance of workmen employed by the contractors, said workmen not being servants of the defendants, to and from their residence and their work, *for reward to the defendants*; and that I. S., in his lifetime, being such workman, became a passenger on a car drawn on said railway by a locomotive under the defendants' management, to be carried from his place of work home, and as such workman and passenger then was lawfully in and on said car, yet the defendants so negligently managed the train, &c., that I. S. was injured thereby, and by reason thereof died.

Pleas: 1. Not guilty, by statute. 2. That the train was not used for conveyance of said workmen for reward to the defendants as alleged, and I. S. was not lawfully on said train.

The words, "for reward to defendants" having been struck out of the declaration at the trial, the defendants demurred to the declaration, and the plaintiff demurred to the second plea.

Held, declaration good, for it shewed that the train under the management of the defendants was for the purpose of carrying materials and the contractors' workmen, and alleged that I. S. was lawfully there, and a sufficient consideration, if any were necessary to be averred, was shewn.

Semble, that it is not proper to allow amendments at the trial, which end, or must end, in a demurrer.

At the trial the evidence shewed that the defendants were only bound by their contract with the contractors to provide an engine and platform cars for carrying ballasting and materials for track-laying, to be under the charge of their own conductor, engineer, and fireman, the contractors to find the brakemen; and that it was not necessary for defendants to carry the workmen. There was no evidence that the defendants consented to the use of the cars by the men, further than that the conductor and engine-driver permitted it.

Held, that I. S. was not lawfully on the cars with the consent of the defendants, and a nonsuit was directed.

Semble, that the deceased could not have been considered a fellow-servant with those employed by the defendants.—*Sheerman v. The Toronto, Grey & Bruce R. W. Co.*, 451.

RAILWAY TIES.

See SALE OF GOODS, 1.

REGISTRATION.

Of Sheriff's deed for taxes.—*See* ASSESSMENT AND TAXES,

Priority of.—*See* JUDGMENT.

REPLEVIN.

1. *Replevin bond—Assignment of*—11 Geo. II. ch. 19, sec. 23—4 Wm. IV. ch. 7, sec. 2, C. S. U. C. ch. 29, sec. 8.] *Held*, that an assignment by the sheriff of a replevin

bond is valid in Ontario, attested by only one witness,

Semble, that a subscribing witness is necessary to its validity.

Held, also, that a plaintiff suing on such bond is entitled to a verdict for the penalty, but the Court will not allow him to recover more than the actual damages if assessed.—*Heley et al. v. Cousins et al.* 63.

2. *Replevin bond—Order setting it aside—Effect of.*—An order of a Judge setting aside a writ of replevin “and all proceedings thereon, subsequent to the issue thereof,” admitting that it extends to the replevin bond, does not of itself absolutely annul the bond, so that to an action on it such order can be pleaded as a defence. The obligor in such case may obtain relief upon application to stay proceedings on the bond, or otherwise, on shewing that he is entitled to it, but the mere setting aside the writ of replevin by the defendant in that suit can be no reason why the bond should not be sued upon, for not prosecuting the suit with effect.—*Meloche v. Reaume, et al.* 606.

3. *Replevin bond—Set-off.*]—To an action on a replevin bond, by the assignee of the sheriff, a set-off forms a good legal defence the penalty being considered as the debt. To such an action defendants pleaded, on equitable grounds, that the cordwood for which the replevin was brought and the bond given was claimed by M. (defendant in the replevin) and it was agreed between him and the plaintiff that M. should haul the wood from where it was cut to the river, and if M. could not prove that he was entitled to the wood, the plaintiff should pay him for hauling and bankage

of the same, which amounted to \$165.

Held, that this sum might be set off against the breach for non-return of the wood. *McKelvey v. McLean et al.* 635.

RULES OF COURT.

278, 291.

SALE OF GOODS.

1. *Contract to get out railway ties—Appropriation and delivery—Right of property.*]—By agreement under seal, dated 29th December, 1871, defendant agreed to deliver to plaintiffs, within four and a half months from date, 5,000 railway ties on the Midland Railway track, at Lakefield, or between there and Peterborough, said ties to be stacked conveniently for loading and inspection; a particular description of tie was specified as the only kind that would be received; the price of each was to be 18 cents; 25 per cent. to be paid when 1,000 or over were delivered and estimated at Young's Point, on the Otonabee River; 25 per cent. more when the ties were delivered on the railway, and the balance within four weeks of the full completion of the contract, but not before the expiration of the time limited in the contract. The evidence shewed that defendant got out 5,280 ties in all; that the plaintiffs paid \$240 to defendants, and \$123.96 Crown dues; and that they received and took away 2,519 ties. A misunderstanding arose as to where the remainder of the ties, which had been brought to Lakefield, were to be culled and inspected, the plaintiffs wishing it at Port Hope, and defendant at Lakefield, and defendant refused to

allow the ties to be shipped from Lakefield till paid for. The plaintiff said he accepted them at Lakefield, subject to the culling, in which defendant was to take a part and one W. swore that he counted and selected them at Young's Point, and reported on them to the plaintiff before they advanced any money but defendant appeared not to have been aware of this. Plaintiffs having replevied a quantity of the ties :

Held, that he could not recover : that the contract itself did not vest the ties in the plaintiff, for they were not then in existence : that it contemplated an inspection, which had not taken place; and there was no other appropriation or delivery of these ties with an intention that the plaintiffs should take them.—*O'Neil et al. v. McIlmoyle*, 236.

2. *Contracts by Telegrams.—Foreign Principal.*—One of the plaintiffs, W., of New York, and his agent, C., of Ingersoll, saw defendant at his cheese factory in Stratford, and talked of the price of cheese. W., in leaving, said any correspondence would be through C., from whom defendant would probably hear on plaintiffs' behalf, when the cheese was ready for sale. Subsequently, plaintiffs authorized C. to buy cheese from defendant, and on the 20th August, at 4 p. m., C telegraphed defendant "Name lowest price for your cheese, stating the number of boxes," which defendant received on the 21st. On the evening of the 21st, defendant telegraphed C., "Will sell 250 cheeses at 10½ cents," which C. received at 9.25 a.m., on the 22nd, and immediately answered by telegraph, "I accept

your offer. When will you box? Answer," which was received at the Stratford office at 10 a.m., and by defendant on the same day. On the evening of the 21st, defendant had left a telegram to be sent to C., on receipt at the telegraph office of C.'s answer to defendant's telegram naming the price. It read, "I have sold in Stratford, did not get your answer in time." This was sent on the 22nd to C., on the receipt of C.'s telegram accepting, and C. answered at once that the plaintiffs would claim the cheese. The defendant in his evidence stated that he did not understand that C. was plaintiffs' agent when they came to his factory.

Held, that the telegrams shewed a complete contract.

Quære, per Wilson, J., whether the words, "when will you box?" after accepting defendants' offer, might not be considered as leaving the bargain still open as to time; but it was inferred from the evidence, the case being tried without a jury, that the parties did not so regard it. Per Morrison, J., it was an enquiry collateral to the contract, and not qualifying the acceptance.

Held, also, that the plaintiffs, though foreign principals, might sue upon the contract, there being evidence to shew that C. was authorized by them to enter into it on their behalf, and that defendant dealt with him as plaintiffs' agent.—*Webb et al. v. Sharman*.—410..

See MONEY PAID.

SALE OF LAND.

Covenants running with the land.]

See COVENANTS FOR TITLE, 2.

SEAL.

Estoppel by receipt under.]—See
ESTOPPEL.

Necessity for to contract by corporation.]—See MUNICIPAL CORPORATIONS.

SET-OFF.

Plea of set-off — Replications — Statute of Limitations—Suing as executor or trustee—Assignment of debt.)—Declaration on an agreement to pay \$450 by a promissory note, breach, non-payment. Sixth plea, set-off, on two notes made by plaintiff, and endorsed to defendant

Seventh plea, in substance : that the same set-off was pleaded by the defendant in a former action by plaintiff against him for the same causes of action as in this suit; and the plaintiff not having replied thereto, and defendant being in a position to sign judgment of *non pros* it was agreed that the plaintiff should pay defendant \$20 and costs in full settlement, and in case of non-payment that defendant should be at liberty to proceed for the recovery thereof in said suit; and that the plaintiff accepted said agreement in full satisfaction and discharge of plaintiffs claim. The plaintiff replied equitably. 2. That defendant waived the agreement by giving the plaintiff notice of his intention to enter judgment of *non pros* in said action for want of a replication, and accepting his costs of defence.

Held, replication bad, for by the agreement defendant was entitled to force the plaintiff on as he did.

The plaintiff also replied equitably, 3. That defendant was indebted to the plaintiff as executor for goods of the testator purchased

on credit, and before the credit had expired or defendant had acquired the notes pleaded, as a set-off, the plaintiff and his co-executors assigned the testator's estate for the benefit of creditors, and plaintiff sued in the former action and sues in this only as a trustee for the estate.

Held, replication no answer, for the accord and satisfaction were not said to have been in fraud or to the disadvantage of the trust, or to have been repudiated by the trustees.

To the sixth plea of set-off, the plaintiff replied, 2. The Statute of Limitations. 3. That the causes of action accrued to him as executor and that he sued for the estate only. 4. That before the suit he and his co-executors assigned &c., (as in the replication to the 7th plea.)

Held, that the third and fourth replications were not bad for departure; but were insufficient as not shewing a full and satisfactory ground for equitable relief against the legal set-off; and that the fourth replication was bad, for not shewing that the set-off had not accrued before the assignment of the debt sued for, or that defendant had any notice of the assignment.

The defendant rejoined in substance to the second replication to the seventh plea, that in the former suit the same subjects of demand and set-off were in dispute, that the former suit was commenced on the 6th Dec. 1862, and was kept pending until the plaintiff, on his own mere motion, discontinued it on the 8th Oct. 1868 : that when the plaintiff commenced this suit on the 9th Oct., 1868, the Statute of Limitations had operated against the set-off; and that the defendant on the 15th March, 1869, and within a

reasonable time, to wit within one year, from the discontinuance of the former action, pleaded the said set-off in this action.

Held, that the rejoinder was good for that in this Province a set-off, on which the defendant may recover a balance, is as much within the equity of the statute as an action for the same demand would be.

To the fourth rejoinder (above set out) to the second replication, of the Statute of Limitations, to the seventh plea of set-off, the plaintiff sur-rejoined, 2. That the two notes were drawn and payable in the Province of Quebec, and by the law there the cause of action thereon became extinguished after five years from the accruing thereof, and that such cause of action became extinguished pending the former action. *Held*, bad as a departure.

The plaintiff also sur-rejoined, 4. in the same terms as the third replication, adding the allegation that defendant knew the plaintiff was acting as executor when he sold the goods to the plaintiff, *held*, not sufficient,

The fifth sur-rejoinder, on equitable grounds was, in substance: that before the former action, and before the term of credit on the sale of the goods expired, and before defendant acquired the set-off, the plaintiff and his co-executors assigned the testator's estate for the benefit of creditors, of all of which defendant had notice, and the plaintiff sued in the former action and sues in this for the estate only.

Held, bad for not alleging directly that defendant had notice of the premises before he acquired his set-off.

The sixth surrejoinder was, that the plaintiff before the credit given to defendant on the sale of the

goods to him had expired, and before defendant had acquired the notes, assigned his estate and effects to J. and M. in trust for his creditors, of which defendant had notice. *Held*, bad.

Held, that the fourth, fifth, and sixth sur-rejoinders were bad also as affording no appropriate or logical answer to the fourth rejoinder.

The plaintiff pleaded a third sur-rejoinder, (set out in the report), to the fourth rejoinder to the second replication to the seventh plea, there being no such rejoinder to the replication to the seventh, but one to the replication to the sixth plea. It was *Held*, bad.—*Parsons v. Crabb*, 136.

See REPLEVIN, 2.

SETTLEMENT OF SUIT.

Agreement for it, Construction of.
—See SET-OFF.

SHERIFF.

Sheriff's account — County audit — Allowance by government.] — A sheriff's account against a county is payable as soon as audited by the county board of audit, and the county treasurer is not justified in withholding payment until the account has been allowed and paid by the Government to the county. —*In re the Sheriff of the County of Lincoln et al.* 1.

SHERIFF'S DEED.

On tax sale, registration of.] — See ASSESSMENT AND TAXES.

SHERIFF'S TARIFF.

OF FEES, 315.

SHIPS.

Proof of ownership of vessel.]—Defendants' vessel having got on shore the plaintiffs' vessel, the *Manitoba*, took off her passengers and freight and conveyed them to their destination, upon an order to do so signed by the purser of defendants' vessel. In an action for the services so rendered, the plaintiffs proved orally that the four defendants sued owned the *Manitoba*. One of the defendants was then called, and swore that another defendant, W. B., Jr., had ceased to have any interest in the *Manitoba* when the services were rendered, though he was still a registered owner. The name of this defendant was then struck out. No certificate of registration was produced.

Held, that the oral evidence of ownership was admissible, and that it was not necessary to produce the certificate; for, assuming that in actions by or against owners of a registered vessel as owners the ownership must be proved by the certificate, yet the mere ownership may not create a liability, and defendants may be liable apart from it under a contract made by their agent, as in this case by the purser.

Semble, that the objection was not open to defendants after their proof, without production of the certificate, that W. B., Jr., had ceased to be owner.—*Lake Superior Navigation Co. v. Beatty et al.*, 201.

SHORTAGE.

See CARRIERS, 1.

SIDEWALKS.

Duty of municipal corporations to repair.]—See HIGHWAYS.

SPECIFICATIONS.

For building contract—Effect of not signing.]—See BUILDING CONTRACT.

STAMPS.

See BILLS AND NOTES.

STATEMENT OF LOSS.

See INSURANCE, 7.

STATUTES, CONSTRUCTION OF.

Retrospective effect of.]—See PUBLIC SCHOOLS.

Consol. Stat. U. C. ch. 29, sec. 8.]—See REPLEVIN, 1.

Consol. Stat. U. C. ch. 52.]—See INSURANCE, 4.

Consol. Stat. U. C. ch. 52, sec. 28.]—See INSURANCE, 1.

Consol. Stat. U. C. ch. 124.]—See MAGISTRATES, 2.

Administration of Justice Act of 1873, secs. 3 & 4.]—See LIEN, 2.

British North America Act, sec. 91.]—See BREWERS—CARRIERS, 1—INSOLVENCY, 3.

C. L. P. Act, sec. 68.]—See MISJOINDER.
Election Law of 1868, sec. 41.]—See DEFAMATION.

Insolvent Act of 1869.]—See INSOLVENCY, 1, 2, 3.

Municipal Act of 1866, sec. 401, *et seq.*]—See MUNICIPAL CORPORATIONS.

11 Geo. II. ch. 19, sec. 23.]—See REPLEVIN, 1.

4 Wm. IV. ch. 7, sec. 2.]—See REPLEVIN, 1.

13 & 14 Vic. ch. 48, sec. 18.]—See PUBLIC SCHOOLS.

13 & 14 Vic. ch. 80.]—See HARBOUR COMMISSIONERS OF TORONTO.

29 Vic. ch. 17, O.]—See INSURANCE, 2.

29 Vic. ch. 28.]—See ASSIGNMENT.

31 Vic. ch. 32, O.]—See INSURANCE, 4.

32 Vic. ch. 6, O.]—See MAGISTRATES, 2.

32 Vic. ch. 32, sec. 1, O.]—See BREWERS.

32 Vic. ch. 32, sec. 25, O.]—See MAGISTRATES, 1.

32 Vic. ch. 36, sec. 155, O.]—See ASSESSMENT AND TAXES.

33 Vic. ch. 2, sec. 1, O.]—*See* BREWERS.
 33 Vic. ch. 19, O.]—*See* CARRIERS, 1.
 33 Vic. ch. 21, O.]—*See* INSURANCE, 2.
 —*See* MUNICIPAL CORPORATIONS.
 33 Vic. ch. 23, O.]—*See* ASSESSMENT AND
 TAXES—LIEN, 1.
 34 Vic. ch. 14, O.]—*See* CARRIERS, 1.
 34 Vic. ch. 33, sec. 16, O.]—*See* PUBLIC
 SCHOOLS.
 35 Vic. ch. 12, O.]—*See* ASSIGNMENT.
 36 Vic. ch. 22, O.]—*See* LIEN, 2.
 31 Vic. ch. 8, D.]—*See* BREWERS.
 31 Vic. ch. 9, sec. 12, D.]—*See* BILLS
 AND NOTES.
 32–33 Vic. ch. 29, sec. 51, D.]—*See*
 CRIMINAL LAW.
 32–33 Vic. ch. 31, D.]—*See* MAGIS-
 TRATES, 2.
 33 Vic. ch. 27, D.]—*See* MAGISTRATES, 2.
 34 Vic. ch. 43, D.]—*See* RAILWAYS AND
 RAILWAY COMPANIES, 1.
 35 Vic. ch. 60, D.]—*See* RAILWAYS AND
 RAILWAY COMPANIES, 1.

STOCK.

Payment of.]—*See* JOINT STOCK
 Co.

SUBSEQUENT PARTY.

*To bill or note within the Stamp
 Act.*]—*See* BILLS AND NOTES.

SURETY.

See PRINCIPAL AND SURETY.

TARIFF OF COSTS.

278.

TAXES.

See ASSESSMENT AND TAXES.

TELEGRAM.

Contract by.]—*See* SALE OF
 GOODS, 2.

THROUGH RATE.

See RAILWAYS AND R. W. Cos., 2.

TORONTO HARBOUR.

See HARBOUR COMMISSIONERS OF
 TORONTO.

TREES.

*Parol reservation of in convey-
 ance of land.*]—*See* CONTRACT, 2.

TRESPASS.

*Pleading — Removal of house —
 Estoppel.*]—1. Declaration, for enter-
 ing plaintiff's land and also
 plaintiff's dwelling-house thereon,
 and removing the house therefrom,
 and converting it to defendant's
 use.

Plea to so much of the count as
 refers to the dwelling-house, that
 before plaintiff became possessed
 and owner of the lot, defendants
 placed the said dwelling-house
 thereon, so that it might thereafter
 be removed by them, not affixing
 it to the land, and defendants after-
 wards, and while the land was un-
 enclosed and used as a common,
 and the house open and unoccupied,
 in the day time, peacefully entered
 the lot and removed the dwelling-
 house, the same being their proper-
 ty, and placed it on their own land,
 which are part of the trespasses
 complained of.

Replication, that defendants
 should not be allowed to plead
 said plea, because they were enti-
 tled to an interest in said land, and
 built the house on the land, and
 occupied it, and afterwards, and
 before the trespasses, &c., by deed
 conveyed the land, with the ap-
 purtenances, to A., who conveyed
 to plaintiffs.

Held, plea bad, as shewing no
 justification for the trespass admit-
 ted.

Held, replication good, by way of estoppel.—*Cameron v. Hunter, et al.*, 121.

2. *Right to maintain action.*—*Quære*, whether the defendant, a mere stranger, could set up the title in the crown as against the plaintiff's possession for forty years with the privity of the Crown. *Semble*, that at all events the plaintiffs could have maintained trespass against him.—*Juson et al. v. Reynolds*, 174.

See CONTRACT, 2.

TRIAL.

Amendment at.—See AMENDMENT—MISJOINDER.

VALUABLE SECURITY.

Giving up within sec. 90 of the Insolvent Act.—See INSOLVENCY, 2.

VESSEL.

See SHIP.

VESTED INTEREST.

See WILL, 1.

WAIVER.

Of agreement of settlement of suit.—See SET-OFF.

WATER AND WATER-COURSES.

See FENCE VIEWERS—INJUNCTION.

WILL.

1. *Ejectment—Will, construction of—Vested or contingent interest.*—The will of P.M., dated 23rd of October, 1838, devised to his third

son W. M. “when he comes of age,” part of the homestead farm, describing it, and some personal property. It also devised to the eldest son, P., “when he comes of age,” the remainder of the homestead farm: and proceeded, “out of which said homestead farm, I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also when my son William shall come of age to have for her own use and benefit the new part of the house lately erected. * * I moreover will that my said wife shall dwell in my said house, * * and receive the rents and profits of the said farm, to bring up and support my said children, * * while she remains my widow.” The will also provided that the stock on the said farm should be kept for the benefit of the trustees until Peter should come of age,

Semble, per Richards, C. J., that W. M. took a vested interest in the land subject to be divested on his death before coming of age.

Held, that if not he took at least a contingent and future interest, which might be disposed of by deed under Consol. Stat. U. C. ch. 9, sec. 5,—*McCoppin v. McGuire*—157.

2. *Ejectment—Life estate*—“*Allowed to live on the land.*”]—J. F., by will dated 8th October, 1871, devised all his real property to his son (the plaintiff); he next devised his personal property, with slight exceptions, to his wife E. F.; and the fourth clause was, “My will is, that my wife shall be allowed to live on the said property during the term of

her natural life." The last clause gave \$50 to his daughter, to be paid by plaintiff. On ejectment by the plaintiff against E. F. and another.

Held, per Morrison and Wilson, JJ., in the Court below, that the fourth clause gave the wife a life estate in the land. Per Richards, C. J., that at most it gave her a right to apply in equity to restrain the plaintiff from ejecting her.

On appeal the judgment below was affirmed. — *Fulton v. Cummings et al.*, 331.

3. Devise to wife and family.]

—A. McD., in 1864, describing himself as of the north half of lot twenty-seven, fifth concession of Nottawasaga, bequeathed "the above-mentioned property in the following manner to my wife (the plaintiff) and family." The will then authorized the executors to cause the proceeds of the said property to be used for the support and keeping of his wife and family for a term of twenty years, and directed them to pay his debts, but did not devise the property to them. The will further directed that, after the said term of twenty years, his son Ronald (the defendant) was to have the south part of the above land, which he was to pay for, and the remainder was devised to another son, who

was directed to pay legacies to his sisters. Subsequently Ronald obtained a patent from the Crown of the land devised to him, *habendum*, "subject nevertheless to the terms and conditions of the last will and testament" of the testator, A. McD.

Held, that the words, "I bequeath," &c., "*in the following manner*," &c., "to my wife and family," carried the estate direct to them, notwithstanding the direction to the executors.

Held, also, that the defendant holding the legal estate under the patent, and having a beneficial interest in his own right as one of the family, the plaintiff could not maintain ejectment against him. — *McDonald v. McDonald*, 369.

WITNESSES.

Commission to examine.] — See COMMISSION TO EXAMINE WITNESSES. See INSURANCE, 6. — REPLEVIN, 1.

WORDS.

"*Allowed to live on the land.*"] — See WILL, 2.

"*Concerned in the loss.*"] — See INSURANCE, 3.

Proceedings in an action.] — See REPLEVIN, 2.

